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No. 08-___

IN THE

Supreme Court of the United States

INTERNATIONAL SHIPPING AGENCY, INC.,
Petitioner,

v.

PUERTO RICO PORTS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state-created entity can be an arm of the state entitled to sovereign immunity under the Eleventh Amendment for some purposes but not for others.

2. Is the Puerto Rico Ports Authority, a public corporation created by the Commonwealth of Puerto Rico, an arm of the Commonwealth for Eleventh Amendment purposes where indicia of immunity point in different directions and the Commonwealth has no liability with respect to the claims being litigated?

PARTIES TO THE PROCEEDING

The Puerto Rico Ports Authority appeared before the United States Court of Appeals for the District of Columbia Circuit as the petitioner. The Federal Maritime Commission and the United States of America appeared before the court of appeals as respondents. Odyssea Stevedoring of Puerto Rico, Inc. and International Shipping Agency, Inc. appeared as respondent-intervenors.

RULE 29.6 STATEMENT

Petitioner International Shipping Agency, Inc. is a private corporation formed under the laws of the Commonwealth of Puerto Rico and owned by individual shareholders. Petitioner has no parent corporation, and no publicly held company owns ten percent (10%) or more of its stock.

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INTERNATIONAL SHIPPING AGENCY, INC.,
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PUERTO RICO PORTS AUTHORITY,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

International Shipping Agency, Inc. respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit in *Puerto Rico Ports Authority* v. *Federal Maritime Commission and United States of America,* No. 06-1407 (July 8, 2008).

OPINIONS BELOW

The opinion of the court of appeals is reported at 531 F.3d 868 (CADC 2008) and is reproduced as Appendix A in the appendix to this Petition ("Pet. App.") at 1a-29a. The opinion of the Federal Maritime Commission is unofficially reported at 30 Pike and Fischer Shipping Regulation Reports (S.R.R.) 1187 (FMC, 2006) and is reproduced as Appendix B at Pet. App. 30a-75a.

JURISDICTION

The court of appeals entered its judgment on July 8, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 2350(a) and 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or subjects of any foreign state.

U.S. CONST., Amend XI.

The Puerto Rico Ports Authority Act, 23 L.P.R.A. 331 *et seq.*, and the Dock & Harbor Act of Puerto Rico of 1968, 23 L.P.R.A. 2101 *et seq.*, are reproduced as Appendix C at Pet. App. 76a-111a and Appendix D at Pet. App. 112a-146a, respectively.

STATEMENT

This case raises important, recurring questions about how the Eleventh Amendment applies to public corporations and other state-created entities. First, this case squarely presents the issue left undecided in *Regents of the University of California* v. *Doe*, 519 U.S. 425, 428 n. 2 (1997): whether an entity may be an arm of the state entitled to sovereign immunity for some purposes, but not for others. Second, it presents the more complex question, which circuits have struggled with in the aftermath of *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994): what is the proper test for determining whether a

public corporation is an arm of the state where indicia of immunity point in different directions, but the state (here, the Commonwealth) has no legal or practical liability with respect to the claims being litigated.

On the first question, the D.C. Circuit held that a state-created body was either always immune or never immune, without regard to the activities or claims involved in a particular case. Pet. App. 8a. That holding conflicts with the four other circuits that have considered the question, including the First Circuit, which has addressed the issue twice with respect to the Puerto Rico Ports Authority. On the second question, the D.C. Circuit's test conflicts both with this Court's ruling in *Hess* and also with other circuits, because the D.C. Circuit failed to acknowledge conflicting indicators of immunity and failed to properly apply the public treasury factor to resolve the tension among the other factors. The D.C. Circuit also held that the "impact to the treasury" factor weighed in favor of immunity if the Commonwealth of Puerto Rico could *ever* be liable for the debts of the public corporation, regardless of whether the Commonwealth would be liable for any judgment arising out of the activities and claims in this case. Pet. App. 20a-22a. To our knowledge, no other federal appellate court has so held.

A. Procedural History

The Puerto Rico Ports Authority ("PRPA") is a marine terminal operator subject to regulation by the Federal Maritime Commission ("FMC") under the Shipping Act of 1984, 46 U.S.C. 40101 *et seq.* Petitioner International Shipping Agency, Inc. ("Intership"), also a marine terminal operator, leases land and facilities from PRPA at the Port of San

Juan. On December 29, 2003, Intership filed a private complaint against PRPA at the FMC alleging that PRPA had committed various violations of the Shipping Act of 1984 in connection with its terminal leasing activities. The allegations all arose out of PRPA's operation and maintenance of the piers and facilities in San Juan Harbor. For example, the complaint alleged that PRPA breached its lease obligations regarding the construction and development of Intership's terminal facilities; failed to timely deliver all land required under the lease agreement; negligently accepted faulty construction resulting in damage to Intership's piers and gantry cranes; and allowed other terminal operator lessees to interfere with Intership's terminal operations.

PRPA moved to dismiss the complaint on grounds of sovereign immunity. A divided FMC denied the motion, holding that when acting as a marine terminal operator PRPA is not an arm of the Commonwealth entitled to share in Puerto Rico's sovereign immunity. Pet. App. 30a. PRPA appealed the FMC decision to the U.S. Court of Appeals for the District of Columbia Circuit.

B. The Decision Below

The D.C. Circuit reversed the FMC and held that PRPA is an arm of the Commonwealth of Puerto Rico. On September 16, 2008, the D.C. Circuit stayed issuance of its mandate pending resolution of this petition.

The D.C. Circuit ruled that an entity cannot be an arm of the state for some purposes but not for others. Pet. App. 8a. According to the D.C. Circuit's opinion, the analysis is not affected in any way by the nature of the claims or activities of the public corporation

involved in the litigation. That holding conflicts with four circuits, including the First Circuit, which has specifically held that PRPA is an arm of the Commonwealth for some purposes but not others. *See Puerto Rico Ports Auth.* v. *M/V Manhattan Prince*, 897 F.2d 1, 10 (CA1 1990); *Royal Caribbean Corp.* v. *Puerto Rico Ports Auth.*, 973 F.2d 8, 9 (CA1 1992).

The D.C. Circuit also failed to follow the mandate of *Hess* to look first at whether structural indicators of immunity point in the same or different directions and then, if the indicators point in different directions, to examine the risk to the public fisc as the deciding factor. Rather than engaging in this type of balancing test, the D.C. Circuit's test relies on certain language and factors that, if present, decide the matter notwithstanding the presence or strength of contrary factors. Pet. App. 11a-12a. Finally, the D.C. Circuit held that immunity should attach because there are some circumstances under which the Commonwealth could be called upon to pay the debts of the PRPA, even though those circumstances are unrelated to this litigation. *Id.* 20a-22a.

REASONS FOR GRANTING THE PETITION

The decision below creates a conflict between the D.C. Circuit and the First, Seventh, Ninth, and Eleventh Circuits on the issue that the Court reserved in *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 428 n.2 (1997): "whether there may be some state instrumentalities that qualify as 'arms of the State' for some purposes but not others." The decision below also exemplifies how circuit courts have struggled with the proper application and weight to be given to various factors enumerated by this Court in *Mt. Healthy City School District Board of Education*

v. *Doyle*, 429 U.S. 274 (1977); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994); and *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002).

I. THE D.C. CIRCUIT'S HOLDING THAT AN ENTITY'S RIGHT TO CLAIM SOVEREIGN IMMUNITY DOES NOT VARY DEPENDING ON THE CLAIMS AND ACTIVITIES INVOLVED IN THE CASE CONFLICTS WITH OTHER CIRCUITS.

A fundamental premise of the decision below was the D.C. Circuit's conclusion that whether an entity is an arm of the state is an all-or-nothing proposition:

> [A]n entity either is or is not an arm of the State: The status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors. Rather, once an entity is determined to be an arm of the State under the three-factor test, that conclusion applies unless and until there are relevant changes in the state law governing the entity.

Pet. App. 8a.

This holding conflicts with other circuits that have considered this question and that have acknowledged that states, which have the freedom to create entities in any manner they desire, may create entities to have multiple roles. Because the state's intent with respect to immunity may vary according to the particular role played by a public corporation, the court

must consider the entity's particular purpose or function implicated by the litigation when deciding whether the entity is an arm of the state in any given case.

The decision below conflicts with the First Circuit, which has held that the PRPA is an arm of the Commonwealth for some purposes, but not for others. The First Circuit has twice considered whether PRPA is an arm of the Commonwealth of Puerto Rico entitled to share in its sovereign immunity. The first time, the First Circuit held that: "After examining the pertinent statutes, we conclude that whether the PRPA is entitled to eleventh amendment protection depends upon the type of activity it engages in and the nature of the claim asserted against it." *Manhattan Prince*, 897 F.2d at 10. The second time, in *Royal Caribbean*, the court stated that "[w]e must answer this question in respect to the particular 'type of activity' by the Ports Authority that is the object of the plaintiff's claims." 973 F.2d at 9 (Breyer, C.J.) (citation omitted).[1]

In these two cases, the First Circuit held that PRPA was an arm of the Commonwealth when it regulated harbor pilots (a function that has now been transferred to the Puerto Rico Harbor Pilotage Commission),[2] *see Manhattan Prince,* 897 F.2d at 12, but that it was not an arm of the Commonwealth when it engaged in the "operation and upkeep of the piers

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[1] *See also Canadian Transport Co.* v. *Puerto Rico Ports Auth.*, 333 F. Supp. 1295 (D.P.R. 1971).

[2] *See* 23 L.P.R.A. § 361 *et seq;. see also Camacho* v. *Puerto Rico Ports Auth.*, 254 F. Supp. 2d 220, 226 (D.P.R. 2003) (noting that *Manhattan Prince* has been superseded by statute), rev'd on other grounds, 369 F.3d 570 (CA1 2004).

and various other facilities in San Juan harbor." *See Royal Caribbean*, 973 F.2d at 9.

The D.C. Circuit held that its decision here is not in conflict with the First Circuit because the First Circuit "expressly departed" from *Royal Caribbean* and *Manhattan Prince* in *Fresenius Medical Care Cardiovascular Resources, Inc.* v. *Puerto Rico & the Caribbean Cardiovascular Center. Corp.*, 322 F.3d 56 (CA1 2003). *See* Pet. App. 10a, n. 3. In fact, *Fresenius* did not overrule or otherwise contradict *Royal Caribbean*. To the contrary, *Royal Caribbean* is cited with approval throughout *Fresenius*, and the First Circuit even noted that *Fresenius* was a "closer case" than *Royal Caribbean*. *See Fresenius*, 322 F.2d at 69; *see also Pastrana-Torres* v. *Corp. de Puerto Rico Para La Difusión Pública*, 460 F.3d 124, 127 (CA1 2006) (relying on *Royal Caribbean*). While it is true that *Fresenius* "reshaped" the First Circuit test "in light of intervening Supreme Court precedent," *Fresenius*, 322 F.3d at 59, the reshaping consisted only of dividing the existing factors into two categories—structure and treasury—to comport with *Hess*. *Fresenius* did not in any way suggest that the restructured test should not be applied to the activities and claims at issue in accordance with existing First Circuit precedent.

The First Circuit is not alone in looking at the specific claims made and activities involved in deciding on immunity. The Eleventh Circuit has also stated that "[w]hether a defendant is an 'arm of the State' must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Manders* v. *Lee*, 338 F.3d 1304, 1308 (CA11 2003); *see also Abusaid* v. *Hillsborough Cty. Brd. of*

Cty. Comm'rs, 405 F.3d 1298, 1303 (CA11 2005) ("The more difficult question – whether the entity sued is an arm of the state – 'must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise.'" (citation omitted)).

The Seventh and Ninth Circuits have likewise held that certain entities are arms of the state only with respect to certain functions. *See, e.g., DeGenova* v. *Sheriff of DuPage Cty.*, 209 F.3d 973, 975 (CA7 2000) ("[W]hether a sheriff acts for the state or a local entity is not an 'all or nothing' determination. Rather, the question is whether, when the Sheriff acts *in a particular area or on a particular issue*, he acts for the State or a local entity." (emphasis added) (citations omitted)). *See also Scott* v. *O'Grady*, 975 F.2d 366, 371 (CA7 1992) ("The fact that [the defendants] normally act as county officials does not mean that they can *never* act as an arm of the state." (emphasis in original)); *Streit* v. *Cty. of Los Angeles*, 236 F.3d 552, 567 (CA9 2001) ("[W]e hold that the [defendant] is not an arm of the state of California in its administration of the local county jails.").

Although the Supreme Court has not addressed the issue in the Eleventh Amendment context, in an analogous analysis of a civil rights claim under 42 U.S.C. 1983, the Court stated that "the question is not whether Sheriff Tate acts for Alabama or Monroe County in *some categorical, 'all or nothing' manner*. Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." *McMillian* v. *Monroe Cty.*, 520 U.S. 781, 785 (1997) (emphasis added) (citation omitted). The Court

further cautioned that application of an "all or nothing" approach in the interest of uniformity would run the risk of disregarding the states' prerogative to create entities in the manner desired. *See id.* at 795 ("while it might be easier to decide cases arising under § 1983 and *Monell* if we insisted on a uniform, national characterization for all sheriffs, such a blunderbuss approach would ignore a crucial axiom of our government: *the States have wide authority to set up their state and local governments as they wish.*" (emphasis added)); *see also Fresenius*, 322 F.3d at 64 ("[S]tates set up entities for many reasons. An erroneous arm-of-the-state decision may frustrate, not advance, a state's dignity and its interests."); *Pastrana-Torres*, 460 F.3d at 126 ("We perform the arm-of-the-state analysis with 'caution, [as] it would be * * * an affront to the state's dignity and fiscal interests were a federal court to find erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty.'" (ellipses and brackets in original) (citations omitted)).

II. THE ARM OF THE STATE TEST APPLIED BY THE D.C. CIRCUIT CONFLICTS WITH PRIOR SUPREME COURT PRECEDENT.

The Supreme Court's most recent explanation of the test for determining whether a particular entity is an arm of the state is set forth in *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). Although *Hess* involved a bi-state compact, most of its analysis is equally relevant to any state-created entity. In *Hess*, the Court emphasized the twin purposes of the Eleventh Amendment—protection of the states' dignity and protection of the states' treasuries. This Court then held that courts must

first ask whether the state clearly structured the entity to share in its immunity and then, if indicators of immunity point in different directions, look to the vulnerability of the State's purse, which is "the most salient factor in Eleventh Amendment determinations." *Id.* at 48.

A. The D.C. Circuit's test does not balance all structural indicators of immunity.

Reviewing the decision below, one could easily conclude that all structural indicators of Eleventh Amendment immunity pointed in the same direction for PRPA. A review of the relevant statutes and the First Circuit's decisions regarding PRPA, however, demonstrates that this is not the case. In both *Royal Caribbean* and *Manhattan Prince*, the First Circuit found numerous factors in the Puerto Rico statutes that weigh against immunity. *See, e.g., Royal Caribbean*, 973 F.2d at 10-11 (citing to 23 L.P.R.A. 333(b), 336(d), 336(e), 336(f), 336(i), 336(j), 336(*l*)(i), 336(n), 336(o), 336(q), 336(s), 336(v) (formerly 336(u)), 338, 2505); *Manhattan Prince*, 897 F.2d at 9-10. Since Puerto Rico is located within the First Circuit, that circuit has more experience and expertise in analyzing Puerto Rican laws and should therefore be accorded considerable deference in its reading of the PRPA enabling statutes. *See McMillian*, 520 U.S. at 786 ("Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law."); *see also Rodriguez v. Puerto Rico Fed'l Affairs Admin.*, 435 F.3d 378, 382 (CADC 2006) (describing the First Circuit as "the Court most expert on Puerto Rico's status"). The D.C. Circuit, however, completely disregarded the First Circuit analysis, and gave no consideration to these indicia.

Instead of considering and balancing all of the structural factors found in PRPA's enabling statute, the D.C. Circuit's test looked for key language and specific indicators that it considered dispositive with respect to the elements or sub-elements of its test.[3] For example, the D.C. Circuit looked to the use of the phrase "government instrumentality" in the Puerto Rico Ports Authority Act as clear evidence of Puerto Rico's intent for PRPA to be an arm of the state. *See* Pet. App. 11a. ("We assess Puerto Rico's intent by examining whether Puerto Rico law expressly characterizes PRPA as a governmental instrumentality * * * .") There is, however, no support for the proposition that by using the words "government instrumentality" the Puerto Rico legislature necessarily intended PRPA to be an arm of the state. The

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[3] The D.C. Circuit applied a "three part test," which actually examines six factors divided into three categories as follows:

1. State Intent:

   a. whether the statutes characterize the entity as a "governmental instrumentality";

   b. whether the entity ever performs state governmental functions;

   c. whether the entity is treated as a governmental instrumentality for purposes of other state laws; and

   d. the state's representation in the instant litigation about the status of the entity.

2. State Control:

   a. whether the state appoints and removes the officers and directors.

3. Risk to the treasury:

   a. whether the state could ever be responsible for a judgment against the entity.

Pet. App. 11a-22a.

words could have several different meanings. The Supreme Court's use of the words suggests that "government instrumentality" is a generic phrase meant to refer to any state-created entity that may or may not be an arm of the state. *See, e.g., Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. at 429 ("When deciding whether a *state instrumentality* may invoke the State's immunity, our cases have inquired into the relationship between the State and the entity in question." (emphasis added)).

The First Circuit agrees. *See Pastrana-Torres*, 460 F.3d at 126 n.2 (noting that "government instrumentality" language appears in various Puerto Rico statutes and is not considered dispositive of a legislative intent to create an arm of the state). In order to determine the intent of the legislature, the language of the statute as a whole must be considered. The D.C. Circuit's focus on the instrumentality language alone caused it to improperly disregard other language evidencing legislative intent for PRPA to be an independent entity, separate and apart from the Commonwealth government. *See, e.g.*, 23 L.P.R.A. 333 (describing PRPA as a "body corporate and politic," and a "public corporation," with a "legal existence and personality separate and apart from those of the Government and any officials thereof"); 23 L.P.R.A. 333(b) (separating the obligations, debts, and undertakings of PRPA from the Commonwealth government); 23 L.P.R.A. 2303(b) (stating that the Commonwealth will not be responsible for damages caused by PRPA when PRPA exercises its property rights as a public corporation). Pet. App. at 79a, 127a.

Similarly, the D.C. Circuit deemed PRPA to be controlled by the Commonwealth as a result of the

governor's appointment of directors. *See* Pet. App. 15a ("In considering [the control] factor, we look primarily at how the directors and officers of PRPA are appointed."). This emphasis on appointment authority to the exclusion of other indicia that demonstrate a lack of governmental control over PRPA's daily activities is inconsistent with *Hess* and other Supreme Court and circuit authorities. Although other courts have considered appointment authority as a factor weighing in favor of immunity, none has treated it as the "primary" consideration evidencing control. *See, e.g., Hess*, 513 U.S. at 36 (finding no immunity where "[t]welve commissioners, six selected by each state, govern the Port Authority."); *Auer* v. *Robbins*, 519 U.S. 452, 456 n.1 (1997) ("While the Governor appoints four of the board's five members, the city of St. Louis is responsible for the board's financial liabilities, and the board is not subject to the State's direction or control in any other respect." (citations omitted)); *Fresenius*, 322 F.3d at 71 ("The governor's appointment power over the board is not enough in itself to establish that PRCCCC is an arm of the state."); *Takle* v. *Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (CA7 2005) ("[T]he power to appoint is not the power to control.").

These are only two examples of how the D.C. Circuit failed to appropriately consider all factors relevant to how Puerto Rico intended to structure the PRPA. By failing to give consideration and effect to all structural indicators of immunity, the D.C. Circuit's test is in conflict with the Supreme Court's analysis in *Hess* and with the balancing tests applied by other circuit courts.

B. The D.C. Circuit did not properly consider whether any judgment would be paid out of the Commonwealth treasury.

Had the D.C. Circuit considered all structural indicators of immunity, it would have concluded that they pointed in different directions and then moved on to consider, as *Hess* requires, whether any judgment against PRPA would be paid out of the Commonwealth treasury, either because the Commonwealth is legally obligated for judgments against PRPA or because the Commonwealth provides general funding for PRPA's activities that would be tapped to pay the judgment. The D.C. Circuit did look at whether any judgment against PRPA would be paid by the Commonwealth, but in doing so, took the "any judgment" concept too far. Rather than looking at any judgment that might be awarded *in the case being litigated*, the D.C. Circuit looked at whether the Commonwealth could be liable for judgments against PRPA under *any* circumstances, expressly including situations not implicated by the litigation at the FMC. Pet. App. 20a-22a.

The Commonwealth would not be liable for any judgment against PRPA in this case. Like the Port Authority of New York and New Jersey in *Hess*, PRPA is financially self sufficient. PRPA receives no funding from the Commonwealth. It finances its activities with fees and charges, including rents and other charges collected from lessees such as Intership, as well as the issuance of bonds. 23 L.P.R.A. 336(*l*)(1), 342. Pet. App. at 85a, 98a. The Puerto Rico Ports Authority Act states that PRPA's "debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings

and properties of the Authority, its officers, agents or employees, shall be deemed to be those of said government controlled corporation, and not those of the Commonwealth of Puerto Rico, or any office, bureau, department, commission, dependency, municipality, branch, agent, officials or employees thereof." 23 L.P.R.A. 333(b). Pet. App. 79a. *See also* 23 L.P.R.A. 336(v) and 346 (stating that the Commonwealth, municipalities and other political subdivisions are not liable on bonds issued by the Port Authority). Pet. App. at 92a, 107a. Moreover, although the Dock and Harbor Act does provide for the Commonwealth to be responsible for damages caused by PRPA employees in those instances where an employee is acting as an agent on behalf of the Commonwealth, the legislature expressly distinguished such acceptance of responsibility from PRPA's activities as a public corporation:

> The damages caused through the action or omission of the Administrator or of any officer, employee or agent of the authority, while acting in his official capacity and within the scope of his function, employment or commitment as an agent of the Government of the Commonwealth of Puerto Rico under the provisions of this chapter (*in contraposition as when acting in the exercise of the property rights of the Authority as a public corporation*) intervening fault or negligence, shall exclusively be requirable [sic] to the Commonwealth of Puerto Rico as provided by law.

23 L.P.R.A. 2303(b) (emphasis added). Pet. App. 127a.

This statutory provision evidences a clear intent on the part of the Puerto Rico legislature to create an

entity that would act as an agent of the Commonwealth for some purposes (thus rendering the Commonwealth liable for damages), but that would also act as an independent public corporation separate and apart from the government of Puerto Rico for other purposes (in which case the Commonwealth would not be liable for damages). The D.C. Circuit's "all or nothing" approach, applied here to its analysis of the risk to the treasury, completely disregards this legislative distinction. By ignoring the intent of the Puerto Rico legislature, the D.C. Circuit not only fails to properly determine whether the treasury is at risk, it also fails to respect the dignity of the Commonwealth by ignoring the right of the legislature to create and structure PRPA as it saw fit. Its analysis is contrary to the holding and principles established in *Hess*.

CONCLUSION

The questions presented raise important issues that are likely to recur. The first question, whether an entity can be an arm of the state for some purposes but not others, presents a fundamental difference between the circuits in how to apply the arm of the state test. The Supreme Court recognized the existence of this open issue in *Regents of the University of California* v. *Doe*, 519 U.S. 425 (1997), but specifically declined to answer the question because it was not necessary to do so in that case. What had been an interesting question has now ripened into a substantial conflict. This case squarely presents the issue and provides the Court with an appropriate opportunity to resolve the matter.

The second question presented arises from the D.C. Circuit's failure to follow *Hess*. The D.C. Circuit's

failure to give weight to the conflicting indicia of immunity and its failure to properly analyze the impact on the Commonwealth's treasury in order to resolve the tensions between the other factors are indicative of how circuit courts have struggled to apply the factors enumerated in *Mt. Healthy*, *Lake Country Estates*, and *Hess*. This case starkly illustrates the practical problem created by this confusion in the lower courts. Having applied their own arm of the state tests, the D.C. Circuit and the First Circuit have arrived at opposite conclusions regarding the status of PRPA when it acts as a marine terminal operator and lessor. As a result, private parties can file complaints against PRPA in federal court in Puerto Rico pursuant to First Circuit precedent, but where, as here, a private party files a complaint against PRPA with a federal agency, its ability to pursue the claim depends upon the reviewing court (which could be courts in the D.C. Circuit or the First Circuit).

The circuit conflict and the conflict between the D.C. Circuit and this Court's guidance in *Hess* are reason enough to warrant review. The importance of the issues presented here is amplified by the fact that the opinion below was issued by the D.C. Circuit. Because a large number of federal agency cases are brought to the D.C. Circuit, there is a significant risk of additional entities being treated as arms of the state in the D.C. Circuit while at the same time being treated as independent entities in their home circuits. The D.C. Circuit's approach creates the rather unusual situation in which a plaintiff would be better off to have its complaint dismissed at the agency level on the ground of sovereign immunity in order to have its choice of forum for appeal. That result is symptomatic of an area of the law in need of prompt

guidance from this Court, and this case presents an opportunity for the Court to address several important and related questions at once. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 3, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1407

PUERTO RICO PORTS AUTHORITY,
Petitioner,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

ODYSSEA STEVEDORING OF PUERTO RICO,
INC. AND INTERNATIONAL SHIPPING
AGENCY, INC., INTERVENORS

On Petition for Review of an Order of the
Federal Maritime Commission

Argued October 26, 2007
Decided July 8, 2008

Gene C. Schaerr argued the cause for petitioner. With him on the briefs were Lawrence I. Kiern and Gerald A. Morrissey III.

Salvador J. Antonetti-Stutts, Solicitor General of Puerto Rico, Department of Justice of the Commonwealth of Puerto Rico, was on the brief for amicus curiae Commonwealth of Puerto Rico in support of petitioner.

Cory R. Cinque, Attorney, Federal Maritime Commission, argued the cause for respondents. With him on the brief were *Thomas O. Barnett*, Assistant Attorney General, U.S. Department of Justice, *Robert B. Nicholson* and *Robert J. Wiggers*, Attorneys, *Amy W. Larson*, General Counsel, Federal Maritime Commission, and *Christopher Hughey*, Deputy General Counsel.

Anne E. Mickey argued the cause for intervenors. With her on the brief were *Heather M. Spring* and *Rick A. Rude*.

Before: SENTELLE, *Chief Judge*, KAVANAUGH, Circuit Judge, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH, in which *Chief Judge* SENTELLE and *Senior Circuit Judge* WILLIAMS *join*.

Concurring opinion filed by *Senior Circuit Judge* WILLIAMS.

KAVANAUGH, *Circuit Judge*: Several commercial marine terminal operators filed complaints with the Federal Maritime Commission against the Puerto Rico Ports Authority. The Authority, which is known as PRPA, asserted sovereign immunity. A divided panel of the Federal Maritime Commission ruled that PRPA is not an arm of the Commonwealth of Puerto Rico and thus not entitled to sovereign immunity. We disagree.

PRPA was created by Puerto Rico law as a "government instrumentality of the Commonwealth of Puerto Rico." P.R. LAWS ANN. tit. 23, § 333(a). By statute, PRPA operates as a "government controlled corporation." § 333(b). It performs governmental functions "for the benefit of the people of Puerto

Rico," including managing Puerto Rico's ports and airports and regulating navigation in Puerto Rico's harbors. § 348(a). Four of PRPA's five directors are high-ranking Commonwealth officials who automatically serve on PRPA's Board by virtue of their government positions. The Governor of Puerto Rico controls the appointment of the directors; the Governor also possesses the power to remove four of the five directors at will and can remove the fifth for cause. The Board of Directors in turn appoints (and can remove at will) PRPA's Executive Director, who is currently Puerto Rico's Secretary of State. By law, moreover, the Commonwealth of Puerto Rico is responsible for paying certain potentially significant judgments arising from lawsuits targeting PRPA.

Considering those facts under the arm-of-the-state precedents of the Supreme Court and this Court, we hold that the Puerto Rico Ports Authority is an arm of the Commonwealth of Puerto Rico and is immune from suit absent its consent.

I

The Puerto Rico Ports Authority is a "government controlled corporation" and "government instrumentality of the Commonwealth of Puerto Rico" that owns and operates Puerto Rico's air and marine mass-transportation facilities and develops Puerto Rico's waterfront lands. P.R. LAWS ANN. tit. 23, §§ 333, 336, 2603. PRPA controls the movement of ships, passengers, and cargo in Puerto Rico's ports, docks, and harbor zones; regulates navigation and marine trade; issues pilot licenses; inspects ships; and leases its facilities to commercial marine terminal operators. §§ 2201, 2501, 2301, 2403, 336(l)(1).

In 1996, Puerto Rico's Governor decided that tourism could enhance Puerto Rico's future economic growth. The Governor launched an economic development project; the goal was to redevelop San Juan's waterfront and harbor by replacing cargo operations with a new convention center and cruise-ship terminals. To further the Governor's objectives, PRPA cleared facilities along the San Juan harbor and waterfront and relocated shipping operations to other ports.

The complaints at issue here stem from PRPA's relocation of private marine terminal operators, as well as certain post-relocation practices and conditions at the new facilities. Three commercial marine terminal operators – Odyssea Stevedoring of Puerto Rico, the International Shipping Agency, and San Antonio Maritime Corporation – filed separate complaints with the Federal Maritime Commission, an agency within the Executive Branch of the U.S. Government. The marine terminal operators alleged that PRPA's marine terminal leasing practices violated the federal Shipping Act of 1984, 46 U.S.C. §§ 41102(c), 41104, 41106. They contended that PRPA: (1) failed to establish reasonable receiving, handling, storing, or delivering practices; (2) gave other customers undue or unreasonable preferences; and (3) unreasonably refused to deal or negotiate with them. The marine terminal operators sought more than $100 million in total damages and a cease-and-desist order prohibiting PRPA from continuing to violate the Shipping Act.

PRPA filed motions for summary judgment, arguing that it is an arm of the Commonwealth and that sovereign immunity therefore barred adjudication of the complaints.

By a 3-2 vote, a divided Federal Maritime Commission held that PRPA is not "an arm of the Commonwealth, and is therefore not entitled to sovereign immunity from the regulatory adjudication of privately-filed complaints before the Federal Maritime Commission." *Odyssea Stevedoring of P.R., Inc. v. PRPA*, at 1, Nos. 02-08, 04-01, 04-06 (Fed. Mar. Comm'n Nov. 30, 2006) (Order), Joint Appendix ("J.A.") 158. Commissioners Brennan and Creel dissented, stating that "the facts relating to control, statewide concerns, and state-law treatment of the entity," among other things, established that PRPA is an "arm of the Commonwealth of Puerto Rico." Order at 47 (Brennan and Creel, Commissioners, dissenting), J.A. 204.

PRPA now petitions for review of the Commission's order.

II

A

The text of the Eleventh Amendment does not expressly provide for state sovereign immunity; the text merely denies federal court jurisdiction over suits against one State by citizens of another State. But under long-standing Supreme Court precedent, the Constitution has been interpreted to encompass a principle of state sovereign immunity and to largely shield States from suit without their consent. *See Alden v. Maine*, 527 U.S. 706, 745-46 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890). The Supreme Court has held that sovereign immunity bars not

only the courts but also federal agencies such as the Federal Maritime Commission from adjudicating complaints against non-consenting States. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 n.6, 760 (2002). As we have held and as the parties here agree, moreover, the Puerto Rican Federal Relations Act grants Puerto Rico the same sovereign immunity that the States possess from suits arising under federal law. *Rodriguez v. P.R. Fed. Affairs Admin.*, 435 F.3d 378, 381-82 (D.C. Cir. 2006); *see also* 48 U.S.C. § 734.[1]

Even where, as here, the State itself is not a named party, sovereign immunity bars suits against an arm of the State. *See, e.g., Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 32-34 (1994); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Courts have held that state entities as varied as universities, transportation authorities, and port authorities can be arms of the State immune from suit. *See, e.g., Doe*, 519 U.S. at 429, 431 (university); *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 219-20 (D.C. Cir. 1986) (transportation authority); *Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1054-55 (4th Cir. 1995) (port authority). Whether an entity is an arm of the State for

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[1] As a result, the parties agree that we need not decide whether Puerto Rico, absent the Puerto Rican Federal Relations Act and solely by virtue of its status as an American territory, otherwise would be entitled to sovereign immunity under the U.S. Constitution. *Cf. P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 141 n.1 (expressing no view on whether the Commonwealth is treated as a State for purposes of sovereign immunity); *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983) ("Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects.").

purposes of sovereign immunity under the U.S. Constitution is a question of federal law. *See Doe*, 519 U.S. at 429 n.5.

Determining whether a particular entity is an arm of the State can be a difficult exercise. The cases generally arise in three different factual settings involving: (1) agencies that are either arms of the State or political subdivisions, such as cities or counties, that are not entitled to sovereign immunity; (2) special-purpose public corporations (like PRPA) established by States to perform specific functions; these may be either arms of the State or non-governmental corporations not entitled to sovereign immunity; and (3) Compact Clause entities established by two or more States by compact and approved by Congress; these are sometimes considered arms of their constituent States for sovereign immunity purposes, although the Supreme Court has recognized a presumption against sovereign immunity for Compact Clause entities, *see Hess*, 513 U.S. at 42.[2]

The courts' arm-of-the-state analysis "has moved freely amongst these three categories, applying common principles." *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr.*, 322 F.3d 56, 61 (1st Cir. 2003). To determine whether an entity is an arm of the State, the Supreme Court and this Court have generally focused on the "nature of the entity created by state law" and whether the State "structured" the entity to enjoy its immunity from suit. *Mt. Healthy*, 429 U.S. at 280; *Hess*, 513 U.S. at 43-44; *Lake Country Estates, Inc. v.*

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[2] None of the Supreme Court's arm-of-the-state cases has considered a special-purpose public corporation like PRPA that was created by the State.

Tahoe Reg'l Planning Agency, 440 U.S. 391, 401 (1979); *see also Morris*, 781 F.2d at 225. That inquiry requires examination of three factors: (1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury. *See, e.g., Hess*, 513 U.S. at 44-46; *Lake Country Estates*, 440 U.S. at 401-02; *Mt. Healthy*, 429 U.S. at 280-81; *Morris*, 781 F.2d at 224-28.

Under the three-factor test, an entity either is or is not an arm of the State: The status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors. Rather, once an entity is determined to be an arm of the State under the three-factor test, that conclusion applies unless and until there are relevant changes in the state law governing the entity.

B

We applied this three-factor test in *Morris v. Washington Metropolitan Area Transit Authority*, 781 F.2d 218 (D.C. Cir. 1986). The marine terminal operators and the Commission suggest that the *Morris* approach does not apply in the same way after the Supreme Court's later decision in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). They contend that the arm-of-the-state inquiry now focuses largely if not entirely on the entity's financial impact on the state treasury and whether the State must pay judgments against the entity. That argument misreads *Hess*, however.

Consistent with prior cases, the *Hess* Court stated that an entity is an arm of the State entitled to sovereign immunity if the State "structured" the entity

to be an arm of the State – a question determined by looking at state intent, including the entity's functions; state control; and the entity's overall effects on the state treasury. *Id.* at 43-46. In considering the status of a Compact Clause entity formed by New York and New Jersey, the *Hess* Court found some indicators of state *control* of the Port Authority, but it found neither the requisite state *intent* to treat the Port Authority as an arm of the State nor any effect on the state *treasury* from the Port Authority. *See id.* at 44-46. As to intent, the Court pointed out that "[t]he compact and its implementing legislation do not type the Authority as a state agency." *Id.* at 44. As to effect on the treasury, the Court noted that "the States lack financial responsibility for the Port Authority. Conceived as a fiscally independent entity financed predominantly by private funds, the Authority generates its own revenues, and for decades has received no money from the States. . . . The States . . . bear no legal liability for Port Authority debts; they are not responsible for the payment of judgments against the Port Authority . . . ." *Id.* at 45-46 (citation omitted). Based on its examination of the factors of intent, control, and overall effects on the treasury, and applying the presumption against sovereign immunity for Compact Clause entities, the Court concluded that the indicators were sufficiently mixed as not to mean the Port Authority was an arm of the States of New York and New Jersey.

We thus read *Hess* in much the same way as did Judge Lynch's thorough First Circuit opinion in *Fresenius Medical Care Cardiovascular Resources, Inc. v. P.R. & the Caribbean Cardiovascular Ctr.*, 322 F.3d 56 (1st Cir. 2003). Applying *Hess*, the *Fresenius* court examined multiple factors, including state intent and control, in assessing whether the State "clearly

structured the entity to share its sovereignty." *Id.* at 68. As the *Fresenius* court correctly stated, *Hess* does not require a focus solely on the financial impact of the entity on the State. Rather, *Hess* "pays considerable deference to the dignity interests of the state, focusing on both explicit and implicit indications that the state sought to cloak an entity in its Eleventh Amendment immunity." *Id.* at 67.[3]

In sum, *Hess* confirms that we must apply the three-factor arm-of-the-state test and look to state intent, state control, and overall effects on the state treasury.

III

To determine whether PRPA qualifies as an arm of the Commonwealth under the sovereign immunity precedents, we now turn to the three relevant factors – the Commonwealth's intent as to the status of PRPA, the Commonwealth's control over PRPA, and PRPA's overall effects on the Commonwealth's treasury. *See, e.g., Hess v. Port Auth. Trans-Hudson*

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[3] The marine terminal operators and the Commission point to older First Circuit precedents holding that PRPA's immunity turns on the nature of its activities giving rise to the case, whether proprietary or governmental functions. *See Royal Caribbean Corp. v. PRPA*, 973 F.2d 8, 9 (1st Cir. 1992); *PRPA v. M/V Manhattan Prince*, 897 F.2d 1, 12 (1st Cir. 1990). But the First Circuit has expressly departed from that narrow focus on governmental-versus-proprietary functions as the test for assessing the sovereign immunity of a special-purpose corporation. In *Fresenius*, the First Circuit stated that it had "reshaped" its arm-of-the-state analysis since those earlier cases. 322 F.3d at 59; *see also Pastrana-Torres v. Corp. de P.R. Para La Difusión Pública*, 460 F.3d 124, 126 (1st Cir. 2006); *Breneman v. United States ex rel. FAA*, 381 F.3d 33, 39 (1st Cir. 2004); *Redondo Constr. Corp. v. P.R. Highway & Transp. Auth.*, 357 F.3d 124, 126 (1st Cir. 2004).

Corp., 513 U.S. 30, 44-46 (1994); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401-02 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 224-28 (D.C. Cir. 1986).

A

We begin by considering Puerto Rico's intent with respect to PRPA. We assess Puerto Rico's intent by examining whether Puerto Rico law expressly characterizes PRPA as a governmental instrumentality rather than as a local governmental or non-governmental entity; whether PRPA performs state governmental functions; whether PRPA is treated as a governmental instrumentality for purposes of other Puerto Rico laws; and Puerto Rico's representations in this case about PRPA's status. *See Hess*, 513 U.S. at 44-45; *Lake Country Estates*, 440 U.S. at 401-02; *Mt. Healthy*, 429 U.S. at 280; *Morris*, 781 F.2d at 224-25.

Whether Puerto Rico Law Expressly Characterizes PRPA as a Governmental Instrumentality: In assessing Puerto Rico's intent as to this special-purpose public corporation, we first examine whether Commonwealth law expressly characterizes PRPA as a governmental instrumentality or instead as a local or non-governmental entity. *See Hess*, 513 U.S. at 44-45; *Lake Country Estates*, 440 U.S. at 401; *Mt. Healthy*, 429 U.S. at 280; *Morris*, 781 F.2d at 225. That's an easy inquiry. PRPA's enabling act describes PRPA as a "government instrumentality of the Commonwealth of Puerto Rico" and "government controlled corporation." P.R. LAWS ANN. tit. 23, § 333(a), (b). That statutory language plainly demonstrates Puerto Rico's intent to create a governmental instrumentality of

the Commonwealth and thus strongly suggests that PRPA is an arm of the Commonwealth entitled to sovereign immunity. *See Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr.*, 322 F.3d 56, 69-70 (1st Cir. 2003) (recognizing that Puerto Rico statutes use term "instrumentality" when Puerto Rico intends to create entity as arm of the Commonwealth); *Morris*, 781 F.2d at 225 (fact that compact labels WMATA a "regional instrumentality, as a common agency of each signatory party" indicated that signatory States intended to confer immunity) (internal quotation marks omitted); *cf. Hess*, 513 U.S. 44-45 (noting that implementing legislation did not characterize entity as a state agency).[4]

Whether PRPA Performs State Governmental Functions: In considering Puerto Rico's intent, we also look to whether PRPA performs functions typically performed by state governments, as opposed to functions ordinarily performed by local governments or non-governmental entities. *See Hess,* 513 U.S. at 45; *Lake Country Estates*, 440 U.S. at 402.

The enabling act charges PRPA with developing, improving, owning, operating, and managing "any and all types of air and marine transportation facilities and services," as well as establishing and managing "mass marine transportation systems in, to and from the Commonwealth of Puerto Rico." § 336. The Dock and Harbor Act further provides that, with some exceptions, PRPA controls the waters, ports,

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[4] In the Supreme Court's three leading arm-of-the-state cases, unlike this case, the relevant law did *not* label the entity a state instrumentality. *See Hess*, 513 U.S. at 44-45; *Lake Country Estates*, 391 U.S. at 401; *Mt. Healthy*, 429 U.S. at 280.

docks, and harbor zones, "which are under the dominion of Puerto Rico." § 2202. That Act also vests PRPA with regulatory authority over pilot services in the harbors of Puerto Rico. §§ 2401-18. Under the Act, PRPA regulates "navigation and the marine trade" in the navigable waters of Puerto Rico, "including the inspection of ships to determine their condition of cleanliness and safety." §§ 2201, 2301.

As a general matter, these functions are governmental but "are not readily classified as typically state" as opposed to local governmental functions. *Hess*, 513 U.S. at 45. Here, however, PRPA's enabling act and Puerto Rico's Dock and Harbor Act indicate that PRPA performs its functions to promote "the general welfare" and to increase "commerce and prosperity" for the benefit "of the people of Puerto Rico." § 348(a); *see also* §§ 2109, 2202. This consideration therefore points in the direction of arm-of-the-Commonwealth status.

Whether PRPA Is Treated as a Governmental Instrumentality for Purposes of Other Puerto Rico Laws: We next look to how PRPA is treated under other Puerto Rico laws. *See Hess*, 513 U.S. at 44-45; *Mt. Healthy*, 429 U.S. at 280; *Morris*, 781 F.2d at 225-28. Like other Commonwealth agencies, PRPA's internal operations are governed by Puerto Rico laws that apply to Commonwealth agencies generally, such as the Puerto Rico Administrative Procedures Act and the Puerto Rico Public Service Personnel Act. *See* Commonwealth's Amicus Br. at 8; P.R. LAWS ANN. tit. 23, §§ 336(l)(3), 337(a). Like other Commonwealth agencies, PRPA does not have private owners or shareholders and does not pay taxes; instead, it must submit a yearly financial statement to the legislature and Governor, and its books are examined periodi-

cally by the Controller of Puerto Rico. §§ 348, 345, 338. Those statutes, too, therefore suggest that PRPA is an arm of the Commonwealth.

Puerto Rico's Representations in This Case About PRPA's Status: Finally, in determining Puerto Rico's intent, we also must respect Puerto Rico's representations to this Court and to the Federal Maritime Commission. *See Lake Country Estates*, 440 U.S. at 401; *Morris*, 781 F.2d at 224-25.

In this Court, the Commonwealth filed an amicus curiae brief, signed by the Solicitor General of Puerto Rico, emphatically declaring that PRPA is an arm of the Commonwealth entitled to sovereign immunity. The Commonwealth's brief explains that PRPA is an "instrumentality of the Commonwealth" that was created in the "form of an authority, rather than a central government agency, in order to have greater flexibility" and to avoid certain restrictions on public funding. Commonwealth's Amicus Br. at 5 (internal quotation marks omitted). The Commonwealth's brief also describes the ways in which the Puerto Rico legislature ensured that the Commonwealth would retain a significant degree of control over PRPA. *Id.* at 6-9. Before the Federal Maritime Commission, the Commonwealth similarly asserted that PRPA is an arm of the Commonwealth. *See Odyssea Stevedoring of P.R. v. PRPA*, at 46-47, Nos. 02-08, 04-01, 04-06 (Fed. Mar. Comm'n Nov. 30, 2006) (Brennan and Creel, Commissioners, dissenting), J.A. 203-04.

Under the governing precedents, the Commonwealth's representations that PRPA was created and intended as an arm of the Commonwealth further indicates that PRPA is in fact an arm of the Commonwealth entitled to sovereign immunity. *See Lake*

Country Estates, 440 U.S. at 401; *Morris*, 781 F.2d at 224-25.[5]

In sum, with respect to the first factor in the arm-of-the-state analysis – Puerto Rico's intent – we conclude that Puerto Rico law's characterization of PRPA as a government instrumentality, PRPA's functions under Puerto Rico law, the fact that PRPA is treated like other Commonwealth agencies for purposes of other Puerto Rico laws, and Puerto Rico's representations in this case all strongly support the conclusion that PRPA is an arm of the Commonwealth entitled to sovereign immunity.

B

We next consider the Commonwealth's "control" over PRPA, the second factor in our arm-of-the-state analysis. In considering this factor, we look primarily at how the directors and officers of PRPA are appointed. *See Hess*, 513 U.S. at 44; *Lake Country Estates*, 440 U.S. at 401; *Morris*, 781 F.2d at 227 (degree of control State exercises over agency is "significant consideration" in immunity analysis).[6]

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[5] The marine terminal operators and the Commission cite a Puerto Rico *intermediate* court decision stating that PRPA is independent of the Commonwealth. *See Transcaribbean Mar. Corp. v. Commonwealth*, 2002 PR App. LEXIS 595 (P.R. Cir. 2002). But the court in that case did not say, or purport to say, that PRPA is not a governmental instrumentality or that PRPA is not an arm of the Commonwealth. In short, we agree with the Commonwealth's amicus brief that the *Transcaribbean* case is nothing more than "an entirely unremarkable application of the standard government liability framework established by Puerto Rico law." Commonwealth's Amicus Br. at 10.

[6] Even in cases where the directors and officers are not government appointees or are not removable at will by government officials, the government's statutory authority to veto an entity's proposed actions can separately indicate governmental

This "control" factor also weighs heavily in the direction of considering PRPA an arm of the Commonwealth. PRPA is governed by a Board consisting of five directors. As the Solicitor General of Puerto Rico has explained in the Commonwealth's amicus brief, four directors are high-ranking governmental officials who are appointed by the Governor to their positions and who automatically become members of PRPA's Board by virtue of their offices: the Secretary of Transportation and Public Works, the Economic Development Administrator, the Secretary of Commerce, and the Executive Director of the Tourism Company. Commonwealth's Amicus Br. at 6; P.R. LAWS ANN. tit. 23, § 334. Those four officials perform their services for PRPA as part of their official government duties; they receive no extra or separate compensation for their Board activities. Tr. of Oral Arg. at 35. By law, the Chair of the Board is the Secretary of Transportation and Public Works. § 334. The fifth Board member is a "private citizen representing the public interest" who is appointed by the Governor with the consent of the Puerto Rico Senate. *Id.* In short, the Governor of Puerto Rico controls the appointment of the entire Board.

The fact that a majority of the directors are high officers of the Commonwealth who hold their directorships because of their positions in the government suffices to demonstrate that the Commonwealth (which can act only through its officers) directly controls PRPA.

And in this case, there is more: As the Solicitor General of Puerto Rico has explained, the Governor

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control. *Cf. Hess*, 513 U.S. at 44; *Lake Country Estates*, 440 U.S. at 402.

also has the power to remove *at will* four of the five members of PRPA's Board of Directors from their government offices. Commonwealth's Amicus Br. at 6-7. Upon removal, they automatically lose their seats on PRPA's Board. *Id.* The fifth Board member, the private citizen representing the public interest, is removable by the Governor for cause. §334. The Governor's power to remove a majority of the Board at will allows him to directly supervise and control PRPA's ongoing operations. *Cf. Edmond v. United States*, 520 U.S. 651, 664 (1997); *Myers v. United States*, 272 U.S. 52, 135 (1926).[7]

The Board of Directors in turn appoints PRPA's Executive Director, who is PRPA's chief executive officer. The Board also can remove the Executive Director at will. § 335. The current Executive Director is the Commonwealth's Secretary of State, a fact further demonstrating that PRPA is a part of the Government – not just on paper, but also in its actual operation.

And there is still more indicating Commonwealth control of PRPA: The Puerto Rico Attorney General has previously opined that the Governor of Puerto Rico retains control of Puerto Rico's public corporations. 1992 Op. Atty. Gen. PR 103 (Sept. 21, 1992). That opinion confirms what the power to appoint and remove already establishes: PRPA operates subject to the direction of the Governor.

The record in this case shows, in addition, how the Commonwealth's legal control of PRPA works in practice. In 1996, Puerto Rico implemented an eco-

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[7] The marine terminal operators and the Commission do not dispute the Commonwealth's representations to this Court about how PRPA's Board members can be appointed and removed.

nomic development strategy to redevelop San Juan's waterfront and make it more suitable for tourism. As part of that plan, the Governor ordered PRPA to demolish some warehouses and cargo operations in order to make room for a convention center and cruise-ship terminals. According to a former PRPA official, the Governor directed the Executive Director of PRPA and other PRPA executives to tear down certain facilities. Deposition of Victor M. Carrion (June 5, 2003), J.A. 340-41. Later, the Governor again ordered PRPA "to expedite the clearing of certain areas along the San Antonio Channel [and] the Port of San Juan." Joint Stipulation of Facts, *Odyssea Stevedoring of P.R. v. PRPA*, at *9-10, No. 02-08 (Fed. Mar. Comm'n), J.A. 228-29. As a result of the Governor's directives, the buildings have been demolished, tenants have been relocated, and the convention center and cruise-ship terminals have been constructed. Those circumstances well illustrate the point that PRPA operates subject to the control of the Governor. *Cf. Lake Country Estates*, 440 U.S. at 402 (States' lack of control over entity was "perhaps most forcefully demonstrated by the fact" that a State had "resorted to litigation in an unsuccessful attempt to impose its will" on the entity.).

In sum, the facts in this case more than suffice to demonstrate that the Commonwealth directly controls PRPA. The second factor in the analysis therefore strongly supports the conclusion that PRPA is an arm of the Commonwealth entitled to sovereign immunity.

C

The third factor we must consider in the arm-of-the-state analysis is PRPA's financial relationship

with the Commonwealth and its overall effects on the Commonwealth's treasury.

The *Hess* Court looked to whether the States "structured" the entity "to enable it to enjoy the special constitutional protection of the States themselves." 513 U.S. at 43-44; *see also Lake Country Estates*, 440 U.S. at 401; *Mt. Healthy*, 429 U.S. at 280. That emphasis on structure indicates we must consider the entity's overall effects on the state treasury. In analyzing this third factor, in other words, the relevant issue is a State's overall responsibility for funding the entity or paying the entity's debts or judgments, not whether the State would be responsible to pay a judgment *in the particular case at issue*. *See Hess*, 513 U.S. at 45-46; *Lake Country Estates*, 440 U.S. at 401-02; *Mt. Healthy*, 429 U.S. at 280.

To be sure, even for entities that are *not* arms of the State, sovereign immunity can apply in a particular case if the entity was acting as an agent of the State or if the State would be obligated to pay a judgment against an entity in that case. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984); *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000). The marine terminal operators and the Commission seek to stretch that principle to also mean that there is no sovereign immunity if the State is not obligated to pay a judgment in the particular case at issue. But that approach would inappropriately convert a *sufficient* condition for sovereign immunity into the single *necessary* condition for arm-of-the-state status. That is not the law; rather, we must apply the three-factor test to determine arm-of-the-state status, and the third factor considers the entity's overall effects on the state treasury. *See Hess*,

513 U.S. at 45-46; *Lake Country Estates*, 440 U.S. at 401-02; *Mt. Healthy*, 429 U.S. at 280.[8]

We turn then to examining PRPA's overall effects on the Commonwealth's treasury. Unlike non-governmental corporations, PRPA has no equity shareholders or private owners. Unlike some governmental agencies, however, PRPA is not financed out of the Commonwealth's general revenues. Instead, like many similarly created governmental entities, PRPA is financed largely through user fees and bonds; it was created in part to avoid Commonwealth-law limits on how much debt the Commonwealth itself can sustain. P.R. LAWS ANN. tit. 23, § 336(l)(1), (n); Commonwealth's Amicus Br. at 5-6; Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1249-50 (1992).

The marine terminal operators and the Commission argue that PRPA has no effect on the Commonwealth's treasury. They point to language in PRPA's enabling act that says PRPA is a "government instrumentality and public corporation with a legal existence and personality separate and apart from those of the Government and any officials thereof."

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[8] Several other circuits also examined an entity's overall effects on the state treasury when considering whether an entity was an arm of the State and gave no indication that a more case-specific determination was required. *See Ernst v. Rising*, 427 F.3d 351, 359-65 (6th Cir. 2005) (en banc); *Benn v. First Judicial Dist.*, 426 F.3d 233, 239-41 (3d Cir. 2005); *Fresenius*, 322 F.3d at 68-75; *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164-66 (10th Cir. 2000); *Thiel v. State Bar of Wis.*, 94 F.3d 399, 401 (7th Cir. 1996); *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293-96 (2d Cir. 1996).

P.R. LAWS ANN. tit. 23, § 333(b). They note that PRPA can "sue and be sued" and enter contracts. § 336(e), (f). They refer to a statutory provision giving PRPA "complete control and supervision of any undertaking constructed or acquired by it." § 336(d). They explain that under Puerto Rico law, PRPA's "debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings and properties . . . shall be deemed to be those of said government controlled corporation, and not those of the Commonwealth of Puerto Rico." § 333(b). They cite the fact that the Commonwealth is not legally liable "for the payment of the principal or of interest on any bonds issued by the Authority." § 336(v). And they point out that PRPA does not have the power "at any time or in any manner to pledge the credit or taxing power of the Common-wealth of Puerto Rico." *Id.*

But the marine terminal operators and the Commission ignore the fact that the Commonwealth is legally liable for some of PRPA's actions. In particular, the Dock and Harbor Act makes the Commonwealth directly liable for certain torts committed by PRPA's officers, employees, or agents when they are acting in their official capacity and within the scope of their function, employment, or agency relationship. § 2303. This provision demonstrates that the Commonwealth itself has some significant financial responsibility for PRPA: Some of PRPA's actions can give rise to legal liability for the Commonwealth, and payment for judgments in those suits comes out of the Commonwealth's coffers. Indeed, the structure here indicates a closer relationship between PRPA and the Commonwealth than if the Commonwealth were only a financial backstop to PRPA: By law, the Commonwealth is substituted for PRPA and directly responsi-

ble for PRPA's actions in certain cases. Therefore, the marine terminal operators and the Commission are factually incorrect in suggesting that PRPA's actions do not affect the state treasury.

Under governing arm-of-the-state precedents, the third factor in the analysis – PRPA's overall effects on the Commonwealth treasury – weighs in favor of finding PRPA to be an arm of the Commonwealth. *Cf. Hess*, 513 U.S. at 4546 ("Pointing away from Eleventh Amendment immunity, the States lack financial responsibility for the Port Authority. . . . [T]hey are not responsible for the payment of judgments against the Port Authority . . . ."); *Lake Country Estates*, 440 U.S. at 402 (States not directly responsible for judgments).[9]

IV

When considered together, the three arm-of-the-state factors – intent, control, and overall effects on the treasury – lead us to conclude that PRPA is an arm of the Commonwealth entitled to sovereign immunity.[10] The marine terminal operators and the

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[9] We recognize that there is no bright line for determining the point at which a State's responsibility for an entity's funds, debts, or judgments suffices to weigh in favor of arm-of-the-state status. Here, however, we think the potentially significant exposure of the Commonwealth's treasury to legal judgments points toward such status.

[10] The First Circuit in *Fresenius* found that the Puerto Rico entity in question in that case was not an arm of the Commonwealth. *See Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr.*, 322 F.3d 56, 75 (1st Cir. 2003). The entity considered in *Fresenius* differed in important ways from PRPA, however. In *Fresenius*, the enabling act did not label the entity a government instrumentality or corporation; here, the enabling act describes PRPA as a government instrumentality, and the *Fresenius* court itself noted that Puerto

Commission do not argue that PRPA has waived its immunity, either because of the Commonwealth's statutory responsibility to pay certain judgments against PRPA in Commonwealth court or because of the statutory sue-and-be-sued clause. Nor would such a waiver argument prevail. *Coll. Sav. Bank v. Fla. Prepaid Secondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) ("State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation" or "merely by stating its intention to 'sue and be sued.'").

We therefore hold that PRPA is an arm of the Commonwealth of Puerto Rico entitled to sovereign immunity. We grant the petition for review of the Federal Maritime Commission's order, and we remand to the Commission with instructions to dismiss the complaints on the ground of sovereign immunity.

So Ordered

Rico has previously used the word "instrumentality" when describing an entity it intended to be an arm of the Commonwealth. *Id.* at 68-70. In *Fresenius*, the entity did not perform governmental functions; here, PRPA performs Commonwealth-wide governmental functions by managing the Commonwealth's ports and airports. *See id.* at 70-71. In *Fresenius*, the entity's employees were not covered by relevant statutory definitions of public employees; here, PRPA's employees are so covered. *Id.* at 70. In *Fresenius*, the Governor did not have the power to remove Board members; here, the Governor has the power to remove all five board members, four of them at will. *See id.* at 71.

WILLIAMS, *Senior Circuit Judge*, concurring: I join the majority's opinion in full; on the basis of the currently prevailing authorities it is entirely sound. I question, however, whether this whole trip was necessary. If I read the Court's precedents correctly, the answer is no; under the law prevailing until the 1970s, we would be rather handily finding that the Puerto Rico Ports Authority lacks sovereign immunity.

Puerto Rico created the Authority as a separate legal person with the capacity "[t]o sue and be sued." P.R. Laws Ann. tit. 23, § 336(e). One might think that this language means what it says, so that the Authority would be amenable to suit in any court of competent jurisdiction. Until fairly recently, that thought would have been correct.

Sovereign immunity has its roots in a doctrine of personal jurisdiction. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559 (2002). A sovereign state may choose to waive its personal immunity or to create separate legal persons that do not share the immunity. Under the old learning, courts saw such a separate legal person as obviously subject to suit.

At the time of our founding, the existence of a separate legal person, with the capacity to sue and be sued, was precisely what set certain non-immune state entities apart from the state itself. Cities, towns, and counties were all recognized as particular types of corporations, known as municipal or "public" corporations. *See Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 668-69 (1819) (opinion of Story, J.). As corporations, they were "artificial person[s], existing in contemplation of law" and possessing "the capacity . . . of suing and being sued in

all things touching [their] corporate rights and duties." *Id.* at 667. It was this corporate status that, at common law, had made them amenable to suit. *See, e.g., Russell v. Men Dwelling in the County of Devon*, (1788) 100 Eng. Rep. 359, 362 (K.B.) (opinion of Kenyon, C.J.); *see also id.* at 360 (argument of counsel). Such a corporation maintained its separate identity (and thus its suability) even if the state held an unqualified financial interest in the corporation's success, *see Bank of the Commonwealth of Ky. v. Wister*, 27 U.S. (2 Pet.) 318, 323 (1829), or had delegated to it the broadest imaginable sovereign powers, *see Barnes v. District of Columbia*, 91 U.S. (1 Otto) 540, 544-45 (1875). In a decision rendered the same day as *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court found it "beyond question" that Lincoln County, Nevada, was outside the scope of the state's immunity. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). Despite a claim that the county was an "integral part of the State," *id.*, the Court held it amenable to suit because "politically it is also a corporation created by and with such powers as are given to it by the State," including the power to "sue and be sued in all courts in like manner as individuals." *Id.* at 530-31. (Of course requests for some kinds of relief, such as for an order of specific action on state property, may render the state itself a necessary party. *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 648-49 (1911); *see also Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 842-43, 858 (1824) (Marshall, C.J.); Paul M. Bator *et al.*, Hart & Wechsler's The Federal Courts and the Federal System 1370-71 (2d ed. 1973).)

Lincoln County was only one in a long train of cases holding that sovereign immunity does not extend to corporations that the sovereign (*i.e.*, a state or

the federal government) has created as separate legal persons. *See, e.g., Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922) ("The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law."); *Hopkins*, 221 U.S. at 645 ("[N]either public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty."); *see also id.* at 646; *Workman v. New York City*, 179 U.S. 552, 565 (1900); *Loeb v. Columbia Twp. Trs.*, 179 U.S. 472, 485-86 (1900); *Chicot County v. Sherwood*, 148 U.S. 529, 533-34 (1893); *Metro. R.R. Co. v. District of Columbia*, 132 U.S. 1, 6, 9 (1889); *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118, 121-22 (1868); *Weightman v. Corp. of Washington*, 66 U.S. (1 Black) 39, 49-50 (1861). Though the defendants were municipal or local corporations in the last six cases in this group, the Emergency Fleet Corporation was nationwide and Clemson appears to have been the state agricultural college for the entirety of South Carolina. Even the cases involving local corporations manifested no interest in the fact of locality, and the decision concerning Clemson cited *Lincoln County* without suggesting that it was in any way extending that case's doctrine.

Unfortunately, this longstanding bright-line rule was not to last. The first step in its demolition was a series of decisions in the 1940s establishing a clear statement rule against federal jurisdiction. Previously, the Court had construed state laws consenting to suits against a particular state officer or department to permit suits in federal courts as well, unless the terms of the consent indicated otherwise. *See*

e.g., *Smith v. Reeves*, 178 U.S. 436, 441 (1900) (reading California's conditional consent to suits against the state treasurer—which enabled the treasurer to insist that the action be tried in a particular state court—as naturally excluding federal suits). In 1944, however, in a suit against state tax collectors, the Court reversed this statute-specific approach in favor of a clear statement rule, requiring "a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *see also id.* at 55 (*citing Reeves*); *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 465 (1945) (applying Read). In *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946), the Court went so far as to read a consent to suit "in any court of competent jurisdiction" as excluding federal courts, simply because another state statute had consented to suits on a different matter "in any court of this state or of the United States." *Id.* at 575 n.1, 580.[1]

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[1] The Court established no such rule, of course, for cases concerning entities endowed by the federal government with the capacity to sue and be sued. See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 705 (1949) (noting that Congress had provided for amenability to suit by different means, in some cases "entrust[ing] the business of the Government to agencies which may contract in their own names and which are subject to suit in their own names," and in others "permitt[ing] suits for damages . . . in the Court of Claims"); *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 83 (1941); *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940); *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939). Since then the rule has become somewhat more confused, see *Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461, 466-67 (D.C. Cir. 1999) (noting changes to the doctrine), but an

The Court took the second and critical step in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). There for the first time it passed in silence over its former rule that a state's government corporations, with a general capacity of suing and being sued in their own names, were *ipso facto* completely bereft of sovereign immunity. The defendant Board of Education conceded that state law made it a corporate body capable "of suing and being sued." *See* Ohio Rev. Code § 3313.17, *cited in* Brief of Petitioners, *Mt. Healthy*, 1976 WL 181610, at *28. The Court nonetheless doubted whether Ohio "had consented to suit against entities such as the Board in the federal courts," *Mt. Healthy*, 429 U.S. at 279-80, citing a case from the *Great Northern* line (namely *Ford Motor*), and thus implicitly extending its cautious rule for state waivers into the context of state government corporations.[2]

Yet the Court remembered that cities and other political subdivisions were subject to suit, *see id.* at 280 (citing Lincoln County), even as it forgot the underlying reason for their being so. To fill the gap, *Mt. Healthy* produced a multi-factor test of family resemblance, asking whether the school board in the case at hand was "*more like* a county or city than it is like an arm of the State." *Id.* (emphasis added). It is unclear why the answer to this perhaps metaphysical question should help resolve the scope of governmental corporate persons' immunity. But by 1981 the Court took it as given that a state governmental cor-

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applicable sue-and-be-sued provision remains fully effective, see *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

[2] *Ford Motor* had concerned a special authorization of tax refund suits against the Indiana Department of the Treasury. *See* 323 U.S. at 465 & n.8.

porate body's general capacity to sue and be sued did not exclude the entity from the state's personal immunity. *See Fla. Dep't of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (*citing Smith v. Reeves*); *see also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999).[3]

Since then, the law of arm-of-the-state immunity has only become more labyrinthine. *See generally Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994); *Morris v. Wash. Metro. Area Transp. Auth.*, 781 F.2d 218 (D.C. Cir. 1986). Under the old rule of *Hopkins*, by contrast, the only jurisdictional inquiry necessary in such a case would be to examine the entity's organic statute and determine whether it was a corporation and legal person capable of appearing in its own name. As it happens, not only was the Authority given the power to sue and be sued, it was established as a "public corporation with a legal existence and personality separate and apart from those of the Government [of Puerto Rico] and any officials thereof." P.R. Laws Ann. tit. 23, § 333(b). So in the days before *Mt. Healthy* the jurisdictional issue here would have been easy.

As an inferior tribunal, however, we are bound by the Court's decisions no matter how much unwelcome complexity they produce. I therefore concur in the majority opinion.

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[3] *Mt. Healthy* thus created a divergence in the treatment of state and federal entities. Federal ones are generally governed by the previous doctrine, see *supra* note 1, while a wholly separate principle applies to state entities.

APPENDIX B

FEDERAL MARITIME COMMISSION

Docket Nos. 02-08; 04-01; 04-06

ODYSSEA STEVEDORING OF PUERTO RICO, INC.

v.

PUERTO RICO PORTS AUTHORITY;

INTERNATIONAL SHIPPING AGENCY, INC.

v.

PUERTO RICO PORTS AUTHORITY;

SAN ANTONIO MARITIME CORPORATION

v.

PUERTO RICO PORTS AUTHORITY.

Served: November 30, 2006

The Puerto Rico Ports Authority is found not to be an arm of the Commonwealth, and is therefore not entitled to sovereign immunity from the regulatory adjudication of privately-filed complaints before the Federal Maritime Commission.

BY THE COMMISSION: Steven R. BLUST, *Chairman*, A. Paul ANDERSON and Rebecca F. DYE, *Commissioners*, announcing the decision of the Commission with respect to Part I, II, III A-C and IV; with A. Paul ANDERSON, Joseph E. BRENNAN, and Harold J. CREEL, Jr., *Commissioners*, delivering the opinion of the Commission with respect to Part

III-D; A. Paul ANDERSON filed a concurring opinion with respect to Part III-D; Steven R. BLUST and Rebecca F. DYE dissenting with respect to Part III-D; and Joseph E. BRENNAN and Harold J. CREEL filed a dissenting opinion.

ORDER

These proceedings were initiated by complaints filed against Puerto Rico Ports Authority ("PRPA") by Odyssea Stevedoring of Puerto Rico, Inc. ("Odyssea"), International Shipping Agency, Inc. ("Intership"), and San Antonio Maritime Corp. and Antilles Cement Corp. (collectively "SAM").[1] Complainants allege that PRPA's marine terminal leasing practices violate sections 10(b)(10), 10(d)(1), 10(d)(3), and 10(d)(4) of the Shipping Act of 1984 ("Shipping Act" or "Act"), 46 U.S.C. §§ 41102 and 41106. Further, Intership alleges that PRPA violated section 10(a)(3) of the Act, 46 U.S.C. § 41102(b), by failing to act in accordance with the terms of an agreement filed with the Federal Maritime Commission ("Commission").[2] The cases are now before the Commission for a determination of whether PRPA is entitled to sovereign immunity. For the reasons set forth below, the Commission has determined that PRPA has failed to meet its burden to show that it is entitled to sovereign immunity as an arm of the Commonwealth. These cases are therefore remanded to the Administrative Law

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[1] These proceedings have not been consolidated. However, for the purpose of judicial economy, these cases have been treated in a similar manner for the purpose of determining whether PRPA is entitled to sovereign immunity as an arm of the Commonwealth of Puerto Rico.

[2] The citations herein reflect the recent codification of Title 46, Pub. L. No. 109-304 (2006).

Judge for further proceedings consistent with this Order.

I. BACKGROUND

A. Case Status

1. *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, Docket No. 02-08

Odyssea is a marine terminal operator involved in the business of providing stevedore and marine terminal operator services to common carriers engaged in U.S. domestic and foreign commerce at facilities in the Port of San Juan, Puerto Rico.

Odyssea filed a complaint against PRPA on May 31, 2002, claiming several violations of the Shipping Act and seeking reparations, a cease and desist order, and other relief as the Commission may deem appropriate. On December 24, 2003, PRPA filed a Motion for Summary Judgment arguing, in part, that sovereign immunity bars the adjudication of Odyssea's complaint. On September 15, 2004, the presiding Administrative Law Judge ("ALJ") issued an oral ruling denying PRPA's motion, and denying its request for a stay pending appeal to the Commission. The oral ruling was followed by a written ruling to the same effect issued on November 9, 2004. On September 16, 2004 the Commission issued an order staying the proceeding in order to permit the Commission to review whether PRPA is entitled to sovereign immunity.

2. *International Shipping Agency, Inc. v. Puerto Rico Ports Authority*, Docket No. 04-01

Intership is a marine terminal operator involved in the business of providing stevedore and marine ter-

minal operator services to ocean common carriers engaged in U.S. domestic and foreign commerce at several berthing facilities in the Port of San Juan, Puerto Rico.

Intership filed a complaint against PRPA on December 29, 2003, claiming several violations of the Shipping Act and seeking reparations and other appropriate relief. On March 5, 2004, PRPA filed a Motion to Dismiss, in part, on the basis of sovereign immunity. On September 17, 2004, the ALJ denied PRPA's motion and ordered it to respond to the complaint. On September 21, 2004, the Commission issued an order staying the proceeding in order to review the issue of whether PRPA is entitled to sovereign immunity.

3. *San Antonio Maritime Corp. and Antilles Cement Corp. v. Puerto Rico Ports Authority*, Docket No. 04-06

SAM is a marine terminal operator engaged in the development of land and dock facilities and the administration of vessels and berthing facilities in the Port of San Juan, Puerto Rico. SAM's operations and facilities are dedicated to the receiving, handling, storing, packing and distribution of cement and related materials.

SAM filed a complaint against PRPA on April 21, 2004, claiming several violations of the Shipping Act and seeking reparations, a cease and desist order, and other appropriate relief. On June 16, 2004, PRPA filed a Motion to Dismiss, in part, on the basis of sovereign immunity. On September 27, 2004, the ALJ referred the issue of PRPA's sovereign immunity to the Commission.

B. Respondent - Puerto Rico Ports Authority

PRPA is a public corporation and government instrumentality of the Commonwealth of Puerto Rico. It is a marine terminal operator that owns and controls marine terminal facilities at the Port of San Juan, Puerto Rico, including facilities at: Puerto Nuevo, Puerto de Tierra, Isla Grande, and the Army Terminal. PRPA is involved in the business of furnishing terminal facilities and services to ocean common carriers operating in U.S. domestic and foreign commerce. PRPA leases facilities to other marine terminal operators, such as Odyssea, Intership and SAM.

PRPA filed dispositive motions in all three cases arguing that the complaints were barred by PRPA's sovereign immunity as an arm of the Commonwealth of Puerto Rico. PRPA's motions argue that the Commonwealth of Puerto Rico is entitled to sovereign immunity, that the Shipping Act does not abrogate that immunity, and that PRPA is an arm of the Commonwealth of Puerto Rico entitled to share in the Commonwealth's sovereign immunity. All three Complainants opposed PRPA's claim of sovereign immunity.

C. Commission Proceedings

On November 22, 2004, the Commission issued an Order in all three cases requesting briefing on the issue of whether the Commonwealth of Puerto Rico should be treated as a state for the purpose of constitutional sovereign immunity in light of the origin and purposes of such immunity ("Order"). The Complainants filed a joint petition for reconsideration of the November 22nd Order on December 20, 2004. On December 22, 2004, the Commission denied the joint pe-

tition, but granted their request to extend the briefing schedule. All of the parties filed opening briefs on January 7, 2005 and reply briefs on February 15, 2005. The Commonwealth of Puerto Rico filed an *amicus curiae* brief on January 7, 2005. In its February 15, 2005 reply memorandum, Odyssea requested that the Commission issue an order to show cause directing PRPA and the Commonwealth to explain why *Trans-Caribbean Maritime Corp. v. Commonwealth of Puerto Rico*, 2002 PR App. Lexis 595 (March 27, 2002) is not controlling in this proceeding. On March 2, 2005, PRPA filed an Opposition to Odyssea's Petition to Show Cause, and on March 9, 2005, the Commonwealth filed a Response to Odyssea's Request for an Order to Show Cause. Intership filed a Motion to Strike on March 17, 2005, to which PRPA and the Commonwealth filed pleadings in opposition

The Commonwealth of Puerto Rico petitioned the Commission for leave to file a brief as *amicus curiae* on January 7, 2005 in response to the Commission's November 22 Order. The Commonwealth's petition for leave is granted. In its *amicus* brief, the Commonwealth argues that although it should be treated as if it were a state for the purposes of sovereign immunity, it is unnecessary to reach the constitutional question since the Puerto Rico Federal Relations Act establishes a default rule that requires application of the laws of the United States to the Commonwealth with the same force and effect as in the states.

On October 17, 2006, the Commission held oral argument in all three proceedings on the specific question of whether PRPA is an arm of the Commonwealth.

II. SUMMARY OF PRPA'S ENABLING STATUTE

The Commission finds that PRPA's enabling statute establishes the following:

1. Puerto Rico Ports Authority is a public corporation and government instrumentality of the Commonwealth of Puerto Rico. *See* 23 L.P.R.A. §§ 331-352.

2. PRPA was created with a legal existence and personality separate and apart from those of the Commonwealth of Puerto Rico and any officials thereof. *See* 23 L.P.R.A. § 331(b).

3. The debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings and properties of the Authority, its officers, agents or employees, have been deemed to be those of PRPA, and not those of the Commonwealth of Puerto Rico, or any office, bureau, department, commission, dependency, municipality, branch, agent, officials, or employees thereof. *See* 23 L.P.R.A. § 333.

4. The purpose of PRPA is to develop and improve, own, operate, and manage any and all types of marine transportation facilities and services in, to and from the Commonwealth of Puerto Rico. *See* 23 L.P.R.A. § 336.

5. PRPA has complete control and supervision of any undertaking constructed by it or acquired by it including the power to determine the character of and necessity for all expenditures and the manner in which they shall be incurred, allowed and paid without regard to the provisions of any laws govern-

ing the expenditure of public funds, and such determination shall be final and conclusive upon all officers of the Commonwealth of Puerto Rico. *See* 23 L.P.R.A. § 336(d).

6. PRPA has the power to sue and be sued. *See* 23 L.P.R.A. § 336(e).

7. PRPA has the power to acquire by purchase, by the exercise of eminent domain, or by any other lawful means, equipment, supplies, services, goods, and such other property real and personal as PRPA deems necessary in connection with its activities. PRPA is further empowered to lease as lessor or exchange any such property or interest therein. *See* 23 L.P.R.A. § 336(h-j).

8. Upon request of the Authority, the Governor of Puerto Rico or the Secretary of the Department of Transportation and Public Works shall have the power to purchase in the name or on behalf of the Commonwealth of Puerto Rico any property, title or interest that PRPA deems necessary and convenient, either by agreement or by the exercise of the right to eminent domain. In either case, PRPA is obligated to reimburse the Commonwealth for the cost of obtaining such property. *See* 23 L.P.R.A. § 339.

9. PRPA has the power to determine, fix, alter, impose and collect rates, fees, rents and other charges for the use of the facilities or services of PRPA. *See* 23 L.P.R.A. § 336(l)(1).

10. PRPA has the power to borrow money, make and issue bonds of PRPA for any of its corporate purposes or for the purpose of financing,

refinancing, paying or discharging any of the outstanding or assumed bonds or obligations and to secure payment of such bonds. *See* 23 L.P.R.A. §§ 331(n)-(o).

11. Bonds and other obligations issued by PRPA are not a debt of the Commonwealth of Puerto Rico or any of its municipalities or other political subdivisions, and neither the Commonwealth nor any political subdivisions shall be liable for such obligations. *See* 23 L.P.R.A. § 345.

12. The legislature has provided certain minimal criteria for the rates, fees, rents and other charges imposed by PRPA. *See* 23 L.P.R.A. §§ 331(l)(1)(A)-(C).

13. PRPA has no power to pledge the credit or taxing power of the Commonwealth of Puerto Rico or any of its political subdivisions, nor can the Commonwealth of Puerto Rico or any of its political subdivisions be liable for the payment of the principal or interest on any bonds issued by the authority. *See* 23 L.P.R.A. § 336(u).

14. All monies of PRPA are deposited in qualified depositories for funds of the Government of the Commonwealth of Puerto Rico, but such funds are kept in a separate account, or accounts, registered in the name of PRPA. The disbursements are made by PRPA pursuant to regulations and budgets approved by the board. The Secretary of the Treasury, in consultation with PRPA, shall establish an accounting system for all expenses and income of PRPA; and the Controller of

Puerto Rico shall examine the books and records of PRPA every three years and provide a report to the Board of Directors of PRPA, the Governor of Puerto Rico and the Legislature of Puerto Rico. *See* 23 L.P.R.A. § 338.

15. PRPA is obligated to submit to the Legislature and the Governor of Puerto Rico, on an annual basis, unless otherwise re-quired, the following items: (1) a financial statement and complete report of the business of the Authority for the preceding fiscal year; and (2) a complete report on the status and progress of all of its undertakings and activities since the date of the last report. *See* 23 L.P.R.A. § 345.

16. PRPA is exempt from payment of taxes. PRPA is obligated to pay four hundred thousand dollars ($400,000) on an annual basis to the Commonwealth Treasury, when such funds are available after payment of operating and maintenance expenses, the principal of and interest on outstanding obligations and the reserves established by PRPA for such purposes. *See* 23 L.P.R.A. § 348.

III. DISCUSSION

The issue currently before the Commission is whether PRPA is entitled to sovereign immunity as an arm of the Commonwealth of Puerto Rico.

A. Arm of the State[3]

PRPA argues that it is entitled to sovereign immunity as an arm of the Commonwealth of Puerto Rico. If PRPA is found to be an arm of the Commonwealth, then PRPA would be entitled to share in any immunity enjoyed by the Commonwealth. PRPA is related to the Commonwealth. However, not every government-related entity is an arm of the state. For example, arm of the state status, or, in this case, status as an arm of the Commonwealth, does not extend to counties and similar municipal corporations. *Mt. Healthy City School Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-281 (1977); *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Northern Ins. Co. of New York v. Chatham County*, 126 S.Ct. 1689 (2006); *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 30 S.R.R. 358, 366 (2004). Accordingly, the Commission must determine whether PRPA is an arm of the Commonwealth.

It is PRPA's burden to demonstrate that it is an arm of the Commonwealth, not the Complainants' burden to prove that it is not. *Gragg v. Ky Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002). As discussed more fully below, we find that PRPA has

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[3] The Commonwealth of Puerto Rico is not a state. However, in order to remain consistent with established legal precedent, the term "state" is used to refer to the concerns of the Commonwealth. This is not intended to elevate the Commonwealth to "state" status based on the application of a legal test to review sovereign immunity.

not met its burden of proof, and we find that PRPA is not an arm of the Commonwealth, and is therefore not entitled to immunity from the adjudication of privately-filed complaints before this Commission.

1. Applicable Standard

As discussed in *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 30 S.R.R. 358 (2004), the Commission's test to determine whether an entity is an arm of the state includes a review of the structure of the entity and the risk to the state treasury. In reviewing the structure of the entity, three factors are considered: 1) the degree of control that the state exercises over the entity at issue; 2) whether the entity deals with local or statewide concerns; and 3) the manner in which applicable law treats the entity. *See Ceres*, 30 S.R.R. at 368-69; *Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, et al.*, 30 S.R.R. 1017, 1029 (2006). This test takes into consideration recent Supreme Court case law that has modified the analysis used to determine whether an entity is an arm of the state. In *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002), the Supreme Court altered traditional notions of determining arm of the state status through its pronouncement that state dignity, rather than risk to the state treasury, is the preeminent purpose of state sovereign immunity.

As noted in an earlier Commission order in these proceedings, the Commission cannot simply follow the law of the circuit in which an action arises since, as a federal agency, cases before it can arise in any jurisdiction and can be subject to appeal in a multitude of circuits. *See* Commission Order in Docket Nos. 02-08; 04-01; 04-06, November 22, 2004. The standard employed by the Commission is consistent

with the substance of the analysis used by the First Circuit. However, the First Circuit reviews the risk to the treasury only if the structural analysis is inconclusive. *See Fresenius Medical Care Cardiovascular Resources, Inc.* v. *Puerto Rico and the Caribbean Cardiovascular Center Corp.*, 322 F.3d 56, 68 (1st Cir. 2003).

2. PRPA's Status under the Applicable Standard

a. Structure

As noted, there are three questions that must be examined in reviewing the structure of an entity. These include the degree of control that the state (here, the Commonwealth) exercises over PRPA, whether PRPA deals with local or statewide concerns, and the manner in which the laws of Puerto Rico treat PRPA.

i. Degree of Control

The first step in reviewing the structure of PRPA is to determine the degree of control that the Commonwealth exercises over PRPA. We have relied on the Commonwealth statute which created PRPA to aid in our analysis of this factor. We have concluded that this enabling statute indicates that PRPA is not under the control of the Commonwealth. The following statutory provisions from PRPA's enabling act indicate the lack of Commonwealth control: (1) PRPA was created with a legal existence and personality separate and apart from those of the Commonwealth and any officials thereof, 23 L.P.R.A. § 331(b); (2) the debts, obligations, contracts, etc. of PRPA are deemed to be those of PRPA and not those of the Commonwealth, 23 L.P.R.A. § 333; (3) the purpose of PRPA is to own, operate and manage transportation facilities,

23 L.P.R.A. § 336; (4) PRPA has complete control and supervision of its under-takings, including the power to determine the character and necessity for its expenditures, and such determinations are final and conclusive upon all officers of the Commonwealth of Puerto Rico, 23 L.P.R.A. § 336(d); (5) PRPA has the power to sue and be sued, 23 L.P.R.A. § 336(e); (6) PRPA has the power and authority to set rates, fees, rents and other charges for the use of its facilities, within established minimums set by the legislature, 23 L.P.R.A. § 331(1)(A)-(C); (7) PRPA has the power to borrow money and issue bonds, although such bonds and other obligations issued by PRPA are not a debt of the Commonwealth or any of its municipalities or other political subdivisions, nor is the Commonwealth or any of its political subdivisions liable for such obligations, 23 L.P.R.A. § 345; (8) PRPA cannot pledge the credit of the Commonwealth, and has not been given the taxing power of the Commonwealth, 23 L.P.R.A. § 331(u); and finally, (9) PRPA's accounts, although deposited in qualified depositories for funds of the Government of the Commonwealth, are to be kept separate and apart from the funds of the Commonwealth, are kept under the name of PRPA, and disbursements of such funds are made pursuant to the regulations and budgets approved by the Board of Directors of PRPA, 23 L.P.R.A. § 338. Finally, despite PRPA's argument to the contrary, PRPA does not have the authority to exercise eminent domain. While section 336(h) allows PRPA to obtain property through the exercise of eminent domain, section 339 provides that it is the Commonwealth that actually has the right to exercise the power of eminent domain, upon PRPA's request.

We note that there are several provisions of the enabling act which PRPA asserts demonstrate that

the Commonwealth exercises some control over PRPA. However, in our evaluation, taken as a whole, PRPA's enabling statute establishes PRPA as an entity with substantial independence from the government of the Commonwealth. PRPA asserts that the following provisions indicate control: (1) the Board of Directors of PRPA is appointed by the Governor, 23 L.P.R.A. § 334; (2) the Controller of Puerto Rico is charged with auditing the books and records of PRPA every three years and providing a report to the Board of Directors of PRPA, the Gov-ernor and the Legislature of Puerto Rico, 23 L.P.R.A. § 338; (3) PRPA is exempt from payment of taxes, although it is required to pay an annual fee in the amount of $400,000, if it has sufficient annual net income, 23 L.P.R.A. §§ 348, 354; and finally, (4) the Commonwealth established PRPA for the public pur-pose of promoting "the general welfare, and the increase of commerce and prosperity," 23 L.P.R.A. § 348(a).

We find PRPA's assertions unpersuasive. The fact that the statute explicitly creates PRPA with a legal existence and personality separate and apart from that of the Government of the Commonwealth, with the power to sue and be sued, and with its funds kept separate and apart from those of the Commonwealth, among other provisions, demonstrates that the legislature did not intend for the Government of the Commonwealth to control PRPA.

A plain reading of the enabling act indicates that the Commonwealth does not exercise significant control over PRPA. Accordingly, this factor does not support finding that PRPA is an arm of the Commonwealth.

ii. Local vs. Statewide Concerns

The second step in the structural analysis is to consider whether PRPA deals with local or statewide concerns. PRPA notes that the Commission has previously found that terminal operations are an essential state function. *See Ceres*, 30 S.R.R. at 369. Further, PRPA's enabling statute entrusts PRPA to manage transportation in order to promote the general welfare, and to increase commerce and prosperity for the whole of Puerto Rico. *See* 23 L.P.R.A. § 336.

Accordingly, the Commission finds that PRPA deals with statewide concerns.

iii. PRPA's Treatment Under the Law of Puerto Rico

The final factor of the structural analysis is to consider the manner in which the law of the Commonwealth treats PRPA. We find that PRPA is not entitled to immunity pursuant to either statutory or case law. As indicated *supra*, PRPA's enabling statute created PRPA with sufficient autonomy so as to be separate and independent from the Commonwealth.

Both Commonwealth and federal courts have found that PRPA is not an arm of the Commonwealth. The Circuit Court of Appeals of Puerto Rico held that the Commonwealth is not answerable for complaints against PRPA when PRPA is exercising its proprietary rights as a marine terminal operator. *Trans-Caribbean Maritime Corp. v. Commonwealth of Puerto Rico*, 2002 PR App. Lexis 595 (March 27, 2002). In its original Motion to Dismiss in *Trans-Caribbean Maritime*, as well as in its *writ of certiorari*, the Commonwealth expressly argued that PRPA is a separate legal entity, and that the Common-wealth should not

be answerable for complaints against PRPA relating to breach of contract matters. Specifically, the Commonwealth argued that, due to the enabling act, "it is clear that [PRPA] is a separate legal entity independent of the Commonwealth with the authority to enter into contracts" and "therefore, the Commonwealth is not liable for the obligations entered into by PRPA." Appellant's Writ of Certiorari at 5, *Trans-Caribbean Maritime Corp.*, 2002 PR App. Lexis 595 (KLCE2001) (2002).

There is also consistent history of federal courts finding that immunity does not extend to PRPA. In *Canadian Transport Auth. v. Puerto Rico Ports Auth.*, 333 F.Supp. 1295 (D.C.P.R. 1971), the U.S. District Court for the District of Puerto Rico ruled that the Commonwealth's immunity does not extend to PRPA because: PRPA was a public corporation with a sufficient identity of its own; PRPA had the power to sue and be sued; and that PRPA, not the Commonwealth, was the real party in interest. The U.S. Court of Appeals for the First Circuit also ruled that PRPA is not entitled to immunity as an arm of the Commonwealth in *Royal Caribbean Corp. v. Puerto Rico Ports Auth.*, 973 F.2d 8 (1st Cir. 1992). The *Royal Caribbean* Court found that "the Ports Authority is an entity that enjoys a considerable degree of autonomy, that it provides a service (maintaining and operating docking facilities) that it, in effect, 'sells' to users, and [that]. . . a judgment [is] likely to be paid from the Authority's funds, not from the Commonwealth's treasury." *Id.* at 12.

PRPA notes that the First Circuit held in favor of immunity in *Puerto Rico Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1 (1990). However, and as discussed by the First Circuit in *Royal Caribbean*, *Man-*

hattan Prince is distinguished due to the type of activity at issue. *Manhattan Prince* found that PRPA enjoyed immunity when acting as a regulatory body. The *Royal Caribbean* Court found the distinction appropriate due to the primarily governmental function at issue in *Manhattan Prince* (regulating the licensing of pilots), compared with the commercial function of owning and operating marine terminal facilities. *Royal Caribbean*, 973 F.2d at 12. Moreover, the First Circuit has specifically reviewed this distinction in PRPA's role as a regulatory body and when operating as a marine terminal operator in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Authority*, 991 F.2d 935, 942 n.6 (1st Cir. 1993). In *Metcalf & Eddy*, the Court noted that:

> In *Manhattan Prince*, the Ports Authority [PRPA] was acting only as the licensor of harbor pilots for whom it provided no training and over whom it exercised no assignment power. The Authority derived no revenue from the licensing function. Moreover, the legislature had explicitly made Authority members' misfeasance of the kind alleged in *Manhattan Prince* attributable only to the Commonwealth. *See* P.R. Laws Ann. tit. 23, § 2303(b) (1987). [This] case is much different; [Puerto Rico Aqueduct and Sewer Authority] charges for its services, controls its total operations, and answers for its own bevues. Thus a more apt Ports Authority analogy is found in *Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d 8 (1st Cir. 1992). That case involved not licensing, but the operation of the ports. *See id.* at 9. Because the Ports Authority charged user fees that supported the costs of its port operations and was relatively free of central government control, we ruled that [PRPA] did

not enjoy Eleventh Amendment immunity with respect to its management of the ports. *Id.* at 12.

Metcalf & Eddy, Inc., 991 F.2d at 942 n.6.

Courts have also found that entities similar in structure to PRPA have not been entitled to share in the Commonwealth's immunity. *See Riefkohl v. Alvarado*, 749 F.Supp. 374, 375 (D.P.R. 1990) (Puerto Rico Electric Power Authority not immune, despite statute declaring it a "governmental instrumentality" with the purpose of "promot[ing] the general welfare and increas[ing] commerce and prosperity") and *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984) (government corporation established to provide drinking water and sewage facilities is not normally immune).

The First Circuit has most recently reviewed an entity very similar in structure to PRPA in *Pastrana-Torres v. Corporacion De Puerto Rico Para La Difusion Publica*, 460 F.3d 124 (1st Cir. 2006). *Pastrana-Torres* found that the Puerto Rico public broadcasting company, WIPR, enjoyed a significant degree of autonomy from the Commonwealth since: (1) it was structured as a public corporation with a juridical personality that is independent and separate from the Commonwealth; (2) its Board of Directors was empowered to approve, amend or repeal regulations necessary to fulfill its mission and may determine the use of its operating budget; (3) the Governor did not have veto authority over the Board of Directors; and (4) the enabling act empowered WIPR with the right to sue and be sued, to enter contracts, to acquire and maintain property and to raise its own revenue. *Id.*

Significantly, the *Pastrana-Torres* Court found it uncontrolling that the Board of Directors was com-

prised of certain government officials, including a cabinet secretary and private citizens appointed by the Governor and confirmed by the Senate, or that the entity was required to submit reports to the Governor and the Legislature. *Pastrana-Torres*, 460 F.3d at 127-128. PRPA's enabling act contains provisions similar to each of the above. After balancing the factors in the enabling act, *Pastrana-Torres* evaluated the risk to the treasury. The Court ultimately found against the entity being an arm of the Commonwealth since the Commonwealth was not bound to pay WIPR's debts, even despite the fact that over 70% of its annual funding came from the Commonwealth. The connections between WIPR and the Commonwealth appear to be much closer than those between PRPA and the Commonwealth.

In sum, PRPA's enabling statute, as well as local and federal case law, overwhelmingly indicate that PRPA is not an arm of the Commonwealth. Our structural analysis, therefore, does not support a finding that PRPA is entitled to treatment as an arm of the Commonwealth.

b. Risk to the Treasury

The second prong of the arm of the state analysis requires examining whether the treasury of the Commonwealth is placed at risk by a judgment against PRPA. PRPA's enabling act indicates the legislature's intent to create PRPA as a fiscally autonomous public corporation, financially independent from the Government. Several statutory pro-visions provide clear evidence of such intent:

Section 333(b) of 23 L.P.R.A. provides:

> The debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts,

> funds, undertakings, and properties of the Authority, its officers, agents or employees, shall be deemed to be those of said government controlled corporations, and not those of the Commonwealth of Puerto Rico, or any office, bureau, department, commission, dependency, municipality, branch, agent or employees thereof.

Section 336(u) of 23 L.P.R.A provides:

> The Authority shall have no power at any time or in any manner to pledge the credit or taxing power of the Commonwealth of Puerto Rico or any of its political subdivisions, nor shall the Commonwealth of Puerto Rico or any of its political subdivisions be liable for the payment of the principal or of the interest on any bonds issued by the Authority.

Section 338(a) of 23 L.P.R.A provides:

> All monies of the Authority shall be deposited in qualified depositories for funds of the Government of the Commonwealth of Puerto Rico, but they shall be kept in a separate account or accounts registered in the name of the Authority.

Section 346 of 23 L.P.R.A provides:

> The bonds and other obligations issued by the Authority shall not be a debt of the Commonwealth of Puerto Rico or any of its municipalities or other political subdivisions, and neither the Commonwealth of Puerto Rico nor any such municipality or other political subdivisions shall be liable thereon, nor shall such bonds or other obligations be payable out of any funds other than those of the Authority.

Further, PRPA does not rely on Commonwealth financing for its operating budget. To the contrary, although PRPA does not pay taxes, it makes payments to the Commonwealth Treasury in the amount of $400,000 per year, which can be reduced if the annual net income of PRPA is insufficient to make payment in full. 23 L.P.R.A. § 354.

The First Circuit reviewed a similar situation in *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp.*, 322 F.3d 56 (1st Cir. 2003). In *Fresenius*, the Court noted that:

> The control asserted by the state is an important guide to the initial inquiry. But where the evidence is that the state did not structure the entity to put the state treasury at risk of paying the judgment, then the fact that the state appoints the majority of the governing board of the agency does not itself lead to the conclusion that the entity is an arm of the state.

Id. at 68. As discussed *supra*, although the Governor appoints PRPA's board of directors, the Commonwealth has insulated its treasury from the debts and obligations of PRPA.

In its Motions for Summary Judgment and to Dismiss, PRPA acknowledged that its accounts are separate from the Commonwealth and that this fact weighs against finding a risk to the Commonwealth's treasury. PRPA's Motion for Summary Judgment in Dkt. No. 02-08 at 43; PRPA's Motion to Dismiss in Dkt. No. 04-01 at 11; and PRPA's Motion to Dismiss in Dkt. No. 04-06 at 4. However, at oral argument, PRPA argues, for the first time, that the real party in interest is the Commonwealth since its treasury is

put at risk by the fault or negligence standards of 23 L.P.R.A. § 2303(b).

Section 2303, however, relates to damages arising under the Dock and Harbor Act of Puerto Rico of 1968. The Dock and Harbor Act charges PRPA with the performance of certain regulatory duties, *e.g.*, licensing harbor pilots, as was at issue in *Manhattan Prince*. Section 2303(b) subjects the Commonwealth to liability for the fault or negligence of PRPA's administrator, or any officer, employee or agent of PRPA in the administration of the Dock and Harbor Act. However, section 2303(b) specifically exempts the Commonwealth from such liability when PRPA is acting as a marine terminal operator. The full text of 23 L.P.R.A. § 2303(b) provides:

> The damages caused through the action or omission of the Administrator or of any officer, employee or agent of the Authority, while acting in his official capacity and within the scope of his function, employment or commitment as an agent of the Government of the Commonwealth of Puerto Rico under the provisions of this chapter (in contraposition as when acting in the exercise of the property rights of the Authority as a public corporation) intervening fault or negligence, shall exclusively be requirable to the Commonwealth of Puerto Rico as provided by law.

In reviewing the distinction between PRPA acting "in the exercise of the property rights of the Authority as a public corporation" and when acting pursuant to the Dock and Harbor Act, the Court of Appeals of Puerto Rico stated that "beyond any doubt, . . . management of the operations of the ports form part of those 'proprietary rights' referred to in section

2303(b)." *Trans-Caribbean Maritime*, 2002 PR App. Lexis 595. *Trans-Caribbean Maritime* makes clear that PRPA's actions as a marine terminal operator do not subject the Commonwealth to liability under section 2303(b). *Id.* The First Circuit has also specifically reviewed this statutory provision and has also distinguished PRPA's role in licensing harbor pilots from that of operating ports. *Metcalf & Eddy*, 991 F.2d at 942 n.6; *compare Royal Caribbean*, 973 F.2d 8, *with Manhattan Prince*, 897 F.2d 1.

We find that there is a strong statutory basis to conclude that the treasury of the Commonwealth of Puerto Rico is not put at risk by a judgment against PRPA. PRPA's debts and obligations are not considered those of the Commonwealth; PRPA does not rely on the Commonwealth for its operating budget; PRPA maintains separate accounts from the Commonwealth, and there is no evidence that the Commonwealth has paid litigation claims and settlements on behalf of PRPA in the past. Accordingly, the above facts demonstrate that the treasury of the Commonwealth would not be placed at risk by a judgment against PRPA.

Our evaluation of all of the relevant factors supports a finding that PRPA is not an arm of the Commonwealth since: the Commonwealth does not appear to exercise a significant measure of control over PRPA; Commonwealth law does not treat PRPA as an arm of the Commonwealth; and the Commonwealth's treasury is not at risk by a judgment against PRPA. That PRPA deals with Commonwealth rather than local concerns is not, when compared with the totality of the evidence, sufficient to negate this finding.

This determination is consistent with recent Commission decisions in *Ceres Marine Terminals, Inc.*, 30 S.R.R. 358 (2004), and *Carolina Marine Handling, Inc.*, 30 S.R.R. 1017 (2006). In *Ceres*, the Commission found that the Maryland Port Administration ("MPA") was entitled to immunity as an arm of the State of Maryland. MPA is a constituent unit of the Maryland Department of Transportation and is overseen by the Maryland Secretary of Transportation. *Ceres Marine Terminals, Inc.*, 30 S.R.R. at 368. The Maryland General Assembly appropriates funds for the Maryland Department of Transportation and the MPA, and places such funds into the Transportation Trust Fund, which pays MPA's debt service and funds authorized transportation activities and projects. *Id.* MPA does not retain revenues generated from taxes, fees and charges, but instead, MPA remits such revenues to the trust fund. A judgment for damages against MPA would be satisfied from the Transportation Trust Fund; however it was found that MPA failed to meet its burden that a judgment would impact the Maryland Treasury. *Id.* at 368-69. Finally, at least one Maryland court has held that MPA was immune from suit in state court. *Id.* at 368. These factors supported the conclusion that the State of Maryland exercised a significant degree of control over MPA.

We also note that in *Carolina Marine Handling, Inc.*, the Charleston Naval Complex Redevelopment Authority ("RDA") was found to be entitled to immunity. In that decision, a majority of the Commission concluded that South Carolina exercises a high degree of control over RDA, RDA deals with issues of statewide importance, and South Carolina law treats RDA as an arm of the state. In reaching this conclusion, the majority noted that South Carolina law au-

thorizes RDA to act as an agent of the state. It also noted that RDA's operations are subject to review by a legislative committee of the state legislature. Finally, with regard to risk to the state treasury, the majority concluded that an adjudication against RDA could impact South Carolina's revenues, as RDA would likely seek funds from the state for payment of a reparations award exceeding RDA's funds. *Carolina Marine Handling, Inc.*, 30 S.R.R. at 1030-1035.

In contrast, PRPA's enabling statute indicates that PRPA was created with a legal existence and personality separate and apart from those of the Commonwealth. PRPA is not authorized by statute to act as an agent of the Commonwealth. PRPA's accounts are separate and apart from those of the Commonwealth. The Commonwealth is not liable for the debts and obligations of PRPA, and, therefore, the Commonwealth's treasury is not put at risk by a judgment against PRPA. Finally, numerous courts have held that PRPA is not entitled to immunity when acting as a marine terminal operator, as is alleged in these cases.

3. Golden Triangle and Regatta 2000

PRPA argues that it "is entitled to immunity for certain actions performed on behalf of the Commonwealth government." PRPA's Motion to Dismiss in Dkt. No. 04-01 at 38; *see also* PRPA's Motion for Summary Judgment in Dkt. No. 02-08 at 12-14 and 40-44; PRPA's Motion to Dismiss in Dkt. No. 04-06 at 6,8. These acts, PRPA alleges, include steps taken in order to execute direct orders of the Governor in furtherance of the Golden Triangle and Regatta 2000 projects, which amount to PRPA acting as an agent of the Commonwealth. PRPA's Reply to Complainant's Opposition to Respondent's Motion to Dismiss in Dkt.

No. 04-06 at 5 (PRPA was "acting as the agent of the Commonwealth's chief executive. . . ."); *see also* PRPA's Motion to Dismiss in Dkt. No. 04-01 at 13; PRPA's Motion for Summary Judgment in Dkt. No. 02-08 at 12-14 and 40-44; PRPA's Motion to Dismiss in Dkt. No. 04-06 at 6,8. The Governor's orders, PRPA argues, required certain adjustments in leasehold interests, including demolition of facilities which gave rise to some portions of the complaints in these proceedings.

PRPA correctly points out that entities that are not normally entitled to immunity can be immune when acting as an agent of the government. PRPA's Reply to Complainant's Opposition to Respondent's Motion to Dismiss in Dkt. No. 04-06 at 5 n.21, *citing Shands Teaching Hospital and Clinics, Inc. v. Beech Street Co.*, 208 F.3d 1308, 1311 (11th Cir. 2000) (private health care administrator immune where adverse judgment could implicate state treasury); *Scott v. O'Grady*, 975 F.2d 366, 371 (7th Cir. 1993) (county sheriff entitled to immunity when acting as an arm of the state judicial system in executing a state warrant). *See also*, *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (independent contractors may be entitled to immunity when performing work for the federal government); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 19 (1940) ("[I]f [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing [the will of Congress].").

However, in this case, PRPA has failed to demonstrate that it is entitled to such immunity. PRPA's argument that it was acting on orders from the Governor and therefore entitled to immunity was soundly

rejected in *Trans-Caribbean Maritime Corp.*, 2002 PR App. Lexis 595. In *Transcaribbean Maritime*, Transcaribbean sued the Commonwealth alleging that the Commonwealth should be liable for a breach of contract committed by PRPA. The contract at issue was a lease between PRPA and Trans-caribbean. Trans-caribbean argued that the Commonwealth should be held liable because PRPA breached the contract in furtherance of an order of the Governor related to Regatta 2000. The Circuit Court of Appeals of Puerto Rico found that PRPA, in breaching the contract, acted in its capacity as the administrator of the ports and not as an agent of the Commonwealth. The facts of *Transcaribbean Mari-time* are closely analogous to those alleged by PRPA in the instant proceedings. PRPA alleges that the complaints arise from actions undertaken when PRPA was acting as an agent of the Commonwealth pursuant to a direct order of the Governor in furtherance of the Golden Triangle and Regatta 2000 projects.

PRPA's position is unsustainable. PRPA has failed to meet its burden of demonstrating that it was acting as an agent of the Commonwealth. PRPA offers only two facts to support its agency relationship. First, PRPA relies on a keynote address given by the Hon. Pedro Rosello, Governor of Puerto Rico, delivered at Hilton Incentive and Meeting Manage-ment Summit, Caribe Hilton Hotel and Casino, in San Juan, Puerto Rico on November 18, 1998. In this speech, the Governor notes that PRPA will be engaged in the relocation of cargo operations to make room for cruise ship operations and a convention center. Second, PRPA offers deposition testimony indicating that in a meeting between the Governor and top government officials, the Governor ordered PRPA to demolish certain maritime facilities in order to ac-

commodate the Golden Triangle project. Deposition of Victor M. Carrion, former Chief of the Maritime Bureau of the Ports Authority, in Docket No. 02-08, dated June 5, 2003, at 68-72.

PRPA provides no evidence of a state law or a contractual obligation with the Commonwealth requiring PRPA to demolish warehouses or otherwise carry out the Governor's orders, and no direct evi-dence of any order at all. In fact, PRPA's enabling act provides that PRPA has "complete control and supervision" of all of its undertakings, 23 L.P.R.A. § 336(d), and, as we have determined, the Commonwealth does not exercise significant control over the operations of PRPA. Furthermore, as the *Trans-caribbean Maritime* Court holds, PRPA's contractual obligations are undertaken based upon PRPA's own authorities and not as an agent of the Commonwealth. *See Trans-Caribbean Maritime Corp.*, 2002 PR App. Lexis 595. PRPA's evidence is insufficient to sustain the existence of an agency relationship in the face of clear evidence that PRPA was created as an entity independent from the Commonwealth, as discussed *supra*.

Based on the foregoing, the Commission finds that PRPA has failed to meet its burden of demonstrating that there was an agency relationship between PRPA and the Commonwealth. Accordingly, we find that PRPA is not entitled to immunity for actions undertaken pursuant to an order of the Governor.

C. Status of Puerto Rico

Since we have determined that PRPA is not an arm of the Commonwealth, it is unnecessary to reach either the question of whether the Commonwealth is entitled to constitutional sovereign immunity, or

whether the Puerto Rico Federal Relations Act would bar private complaints under the Shipping Act. Accordingly, we have determined not to rule upon constitutional or statutory immunity.

D. Procedural Issues

As noted *supra*, in response to Odyssea's February 15, 2005 reply memorandum, PRPA filed an Opposition to Odyssea's Petition to Show Cause, the Commonwealth filed a Response to Odyssea's Request for an Order to Show Cause, Intership filed a Motion to Strike, and both PRPA and the Commonwealth filed Oppositions to Intership's Motion to Strike. These pleadings were placed in the public docket and circulated to the Commission. Subsequently, at the oral argument held October 17, 2006, to consider the issue of whether PRPA is an arm of the Commonwealth, information contained in these pleadings was discussed by the Commission and counsel for the parties involved. The pleadings were treated by the Commission and the parties as though they were part of the record. In light of the Commission's treatment of these pleadings, a majority of the Commission (Commissioners Anderson, Brennan and Creel) accept them into the record.

Chairman Blust and Commissioner Dye would find that these filings are not authorized by the Commission's Rules of Practice and Procedure and would therefore reject them. Rule 74 expressly provides that a reply to a reply is not permitted. 46 C.F.R. § 502.74(a)(1). Similarly, they would not waive the procedural rules to accept these filings, as provided for in Rule 10. The authority to waive any of the Commission's Rules should only be invoked when such a waiver would not be inconsistent with those rules, and that is not the case here. 46 C.F.R.

§ 502.10. Moreover, Rule 10 provides for waiver in particular cases "to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." 46 C.F.R. § 502.10. They believe none of these conditions exist here. Rather, it is their view that invoking the waiver procedure would cause significant harm to the Complainants, particularly Intership who has filed a motion to strike the offending filings. In any case, Chairman Blust and Commissioner Dye believe that the Commonwealth's views constitute legal argument and not evidence, and that their argument is substantially undermined by the Commonwealth's prior inconsistent statements submitted to the Circuit Court of Appeals of Puerto Rico in the *Trans-Caribbean* case.

IV. CONCLUSION

For the foregoing reasons, the Commission: grants the Commonwealth of Puerto Rico's Petition for Leave to File a Brief as an *amicus curiae* on the question of whether the Commonwealth is entitled to constitutional sovereign immunity; finds that PRPA is not an arm of the Commonwealth of Puerto Rico and is therefore not entitled to the protections of sovereign immunity; and finds that PRPA is also not entitled to sovereign immunity as an agent of the Commonwealth of Puerto Rico.

THEREFORE, IT IS ORDERED, that the above captioned proceedings are remanded to the Office of the Administrative Law Judge for further proceedings consistent with this Order.

Concurring Opinion

Commissioner ANDERSON, concurring in the result.

While I concur in the conclusion that PRPA is not an arm of the Commonwealth of Puerto Rico, I believe that a statement included in a pleading filed by the Commonwealth should be addressed in reaching this conclusion. The statement is that the Commonwealth agrees that PRPA is an arm of the Commonwealth. As suggested by counsel for PRPA at the oral argument, this statement should be weighed with other relevant evidence in reaching a decision as to whether PRPA is entitled to immunity as an arm of the Commonwealth. Other relevant evidence includes PRPA's enabling statute, the treatment of PRPA under the law of Puerto Rico, and whether a judgment against PRPA would place the Common-wealth's treasury at risk.

Taken as a whole, PRPA's enabling statute establishes it as an entity with substantial independence from the Commonwealth: it provides that PRPA has a legal existence and personality separate from that of the Government of the Commonwealth; it has the power to sue and be sued; its debts, obligations and contracts are not considered to be those of the Commonwealth; it has complete control and super-vision of its undertakings; and its funds are separate from those of the Commonwealth. In addition, local and federal case law indicate that PRPA is not an arm of the Commonwealth. Finally, as the Common-wealth is not liable for the debts and obligations of PRPA, it does not appear that the Commonwealth's treasury would be placed at risk by a judgment against PRPA. Weighed against this evidence, the Commonwealth's statement is not persuasive, especially when considered in light of its position in *Trans-Caribbean*, in

which it argued that PRPA does not operate in a governmental capacity when it engages in certain dock operating activities.

Dissenting Opinion

Commissioner BRENNAN and Commissioner CREEL, dissenting.

For the reasons set forth below, we find that the Puerto Rico Ports Authority ("PRPA") is an arm of the Commonwealth of Puerto Rico and is entitled to whatever privileges that status affords it in these proceedings before the FMC.

A. Ceres Analysis

Our analysis of arm-of-the-state status is conducted pursuant to the factors that the Commission established in *Ceres Marine Terminals v. Maryland Port Administration*, 30 S.R.R. 358 (2004), sub-sequent to the United States Supreme Court's decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002). In *Ceres*, the Commission noted that the issue of whether the Maryland Port Administration is an arm of the state was a question of federal law and that the tests for determining that status varied among the circuits. *Ceres* at 366. The Commission then adopted and applied a two-part test focusing on: 1) the structure of the entity and 2) the risk to the state treasury. With respect to the structure of the entity, the Commission examined: 1) the degree of control that the state exercises over the entity; 2) whether the entity deals with local or statewide concerns; and 3) the manner in which state law treats the entity. *Ceres* at 368-370. In concluding that PRPA is an arm of the Commonwealth, we have considered all relevant facts within the *Ceres* framework. As in *Ceres* and *Carolina Ma-*

rine Handling v. South Carolina State Ports Authority, et al., 30 S.R.R. 1017 (2006), the Commission determines whether an entity is an arm of the state based on all of the *Ceres* factors taken together. *Id.* at 1035. No one factor is controlling, and it is not necessary for all of the *Ceres* factors to be satisfied for an entity to be an arm of the state.

Control is the first element of the "structure" analysis of the *Ceres* test; that is, what degree of control does the state exercise over the entity? In the instant cases, the Commonwealth has created PRPA in such a manner that it exercises significant control over the Ports Authority. As a practical matter, the Governor of Puerto Rico controls PRPA's Board of Directors and therefore PRPA, because the Governor can remove 80% of the Board at any time as he or she sees fit.[1] The chairman of the Board of Directors is the Secretary of Transportation and Public Works. 23 L.P.R.A. § 334. Four of the five members of PRPA's Board of Directors are members of the Governor's cabinet[2] and serve at the governor's pleasure. Moreover, in practice, it appears that, on occasion, the Board has acted at the Governor's direction or control in certain policy matters.[3]

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[1] This degree of control was not present in *Pastrana-Torres v. Corporación de Puerto Rico para la Difusión Pública*, 460 F.3d 124 (1st Cir. 2006), the federal case cited by the majority opinion in its discussion of how Commonwealth law treats PRPA. Of eleven board members of the Public Broadcasting Corporation, only one was a cabinet member, eight were from the private sector, and all were appointed with the advice and consent of the Senate. There are other significant differences between PRPA and PBC, which we do not need to address here.

[2] 23 L.P.R.A. § 334.

[3] Deposition of Victor M. Carrion, former Chief of the

Other facts also show significant Commonwealth control over PRPA. Each year, the Ports Authority must submit to the Governor and the Legislature a financial statement and complete report of its business for the preceding year. 23 L.P.R.A. § 345. In addition, PRPA must submit a complete report on the status and progress of all of its undertakings and activities since its last report. *Id.* The Secretary of the Treasury establishes PRPA's accounting system, in consultation with PRPA. 23 L.P.R.A. § 338.

The Controller of Puerto Rico must examine PRPA's books at least every three years, or as necessary, and report to PRPA's Board of Directors, the Governor, and the Legislature. *Id.* Moreover, the rates PRPA charges are subject to criteria established by the Legislature. 23 L.P.R.A. § 336(l). If PRPA's Board of Directors wishes to change the general rate structure immediately, it must file the rate regulations with the Department of State in accordance with statutory requirements and must hold a hearing within 30 days of the filing. 23 L.P.R.A. § 336(l)(1)(c).

As to *local vs. statewide concerns*, the second element of the *Ceres* "structure" analysis, the Puerto Rico Ports Authority plainly deals with statewide, not

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Maritime Bureau of the Ports Authority, in Docket No. 02-08, dated June 5, 2003, at 68-72 (stating that, in June 1998, Governor Pedro Rosselló summoned PRPA management and the heads of the Departments of Tourism, Transportation and Public Works, and Economic Development and told them, "I want everything torn down—all the facilities from Pier 8 to the Frontier Base."). Furthermore, the former general counsel and executive director of PRPA testified that the Board of Directors reports to the Governor of the Commonwealth. Deposition of Jose Guillermo Baquero, Vol. II, at 7-9 (Aug. 26, 2003).

merely local, concerns. The Authority is defined as a "public corporation and government instrumentality of the Commonwealth of Puerto Rico" (23 L.P.R.A. § 333(a)) and was created to develop, own, operate, and manage all air and marine transportation facilities and systems to and from the Commonwealth of Puerto Rico, for the purpose of promoting the general welfare and increasing commerce and prosperity. 23 L.P.R.A. § 336. As noted by the Commission in *Carolina Marine*, "ports in the United States . . . serve as vital gateways to international commerce, impacting the economies of their respective states." *Carolina Marine* at 1032. The economic importance of ports is even greater given the geographic nature of Puerto Rico; it is an isolated island commonwealth, with no roads, bridges, or tunnels connecting it to the U.S. mainland. All of Puerto Rico's imports and exports arrive or depart by sea or air and are subject to PRPA's jurisdiction or control.

The third "structure" element under *Ceres* is the manner in which state law treats the entity. Again, the balance of the facts indicates arm-of-the-state status. The Solicitor General of the Commonwealth of Puerto Rico unambiguously affirms that "the Commonwealth fully agrees that the Ports Authority is an arm of the Commonwealth." Commonwealth's *Response to Odyssea's Request for an Order to Show Cause* at 2, submitted by Salvador J. Antonetti-Stutts, Esq., Solicitor General, Department of Justice, Commonwealth of Puerto Rico on March 9, 2005. The Commonwealth also explicitly joins and supports PRPA's briefs, which argue in favor of finding that PRPA is an arm of the Commonwealth. *Id.* The Commonwealth further noted that it was doing so" . . . because the Commonwealth exercised a significant

degree of control over the actions of the Ports Authority that are at issue in this case. *Id.* at 6.

There are further facts relevant to how Commonwealth law treats the Ports Authority. For example, the Authority is specifically referenced by statute as a "*government controlled* corporation." 23 L.P.R.A. § 333(b) (emphasis added). It was set up as a "public corporation and government instrumentality" (23 L.P.R.A. § 333(a)) to serve the public welfare. 23 L.P.R.A. § 348 (PRPA established for "public purposes for the benefit of the people of Puerto Rico"). The harbors, waters, and public docks of Puerto Rico were placed under the control of PRPA and are to be administered by PRPA to benefit the people of Puerto Rico in the interest of navigation and commerce. 23 L.P.R.A. § 2202. Having the power of eminent domain, (23 L.P.R.A. § 336(h)), PRPA may, in coordination with the Commonwealth, acquire any property that the Board of Directors deems necessary and convenient for its purposes. 23 L.P.R.A. § 339. Also relevant to the structure analysis is the fact that, by law, no person having an economic interest in any private interest engaged in the transportation business may hold office on PRPA's Board of Directors or as an officer, employee, or agent of the Puerto Rico Ports Authority. 23 L.P.R.A. §§ 334, 337(b).

Moreover, PRPA deposits its funds in qualified depositories for funds of the Government of Puerto Rico, even if such funds are kept in separate accounts in the name of PRPA. 23 L.P.R.A. § 338. PRPA is exempt from state taxes. 23 L.P.R.A. § 348. It must pay $400,000 into the Commonwealth Treasury annually, but only if such funds are available. 23 L.P.R.A. § 354. PRPA is also exempt from all fees, taxes, and imposts relating to judicial proceedings, governmen-

tal certifications, and the execution and registration of public documents in Puerto Rico. 23 L.P.R.A. § 348. These numerous facts indicate that Commonwealth law treats PRPA as an arm of the Commonwealth.

With respect to the second part of the *Ceres* analysis, whether a judgment against PRPA would implicate the treasury of the Commonwealth, we agree with the majority that PRPA has not met its burden. As noted in *Ceres* and *Carolina Marine*, however, this is hardly a fatal flaw to reaching a determination here that PRPA is an arm of the Commonwealth.

In conducting our *Ceres* analysis, we are mindful that the United States Supreme Court, in considering the application of sovereign immunity to proceedings before federal administrative agencies, has emphasized protecting the dignity of the sovereign. The governmental/proprietary analysis of *Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d 8 (1st Cir. 1992), played no part in the Supreme Court's analysis in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), the 2002 case that markedly changed the landscape for sovereign immunity issues, and which the Commission took into account in formulating its *Ceres* test in 2004. In *South Carolina Ports Authority*, the Supreme Court held that state sovereign immunity precluded the Federal Maritime Commission from adjudicating a private-party complaint alleging that a state-run port had violated the Shipping Act.

"The preeminent purpose of state sovereign immunity," the Court declared, "is to accord States the dignity that is consistent with their status as sovereign entities." 535 U.S. at 760. In this regard, the Court further stated, "simply put, if the Framers thought it an impermissible affront to a State's dignity to be re-

quired to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC." *Id.* In the proceedings currently before us, the sovereign agrees with PRPA and maintains that PRPA is an arm of the Commonwealth. We believe that for the Commission to conclude otherwise would be a significant affront to the sovereign's dignity.

Under the two-part *Ceres* test, the focus is properly on the entity's structure and the financial risk to the state. The particular complained-of conduct is relevant only to the extent that it is probative of structure or financial risk. In this regard, once it is decided that an entity is an arm of the state, we believe that the entity is an arm of the state for all purposes. In *Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d 8 (1st Cir. 1992), the Court of Appeals for the First Circuit declined to find that PRPA, when operating and maintaining docks, was an arm of the Commonwealth. The Court relied, in part, on the fact that PRPA's marine terminal activities (specifically, the allegedly negligent maintenance of a pier) were proprietary rather than governmental in nature. While *Royal Caribbean*[4] did look at several factors used in the *Ceres* analysis, the Court was also persuaded to a large degree by a "proprietary vs. governmental" distinction which is not part of the Commission's *Ceres* test and which be-came incorrect following the Supreme Court's emphasis on state dig-

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[4] By citing federal cases such as *Royal Caribbean* for the purpose of establishing, in part, how state (or Commonwealth) law treats the entity, the majority departs from the *Ceres* test.

nity in its 2002 ruling in *South Carolina Ports Authority*.[5]

We accord *Transcaribbean Maritime Corp. v. Commonwealth of Puerto Rico*, 2002 PR App. LEXIS 595 (March 27, 2002) much less weight than does the majority in the analysis of how Commonwealth law treats PRPA. In the first place, *Transcaribbean* was issued not by the Commonwealth's highest court, but by an intermediate court, the Circuit Court of Appeals of Puerto Rico. Furthermore, the court did not directly address Eleventh Amendment sovereign immunity. The issue before it was a simple breach of contract claim brought by a lessee, Transcaribbean, against the Commonwealth and PRPA The court dismissed the Commonwealth from the proceeding pursuant to 23 L.P.R.A. § 2303(b)[6] not only because the relevant dock operations of PRPA were held to be proprietary, rather than governmental, in nature, but more fundamentally because the complaint failed to "state facts which attribute any specific negligent act whatsoever to the Administrator, nor to any of the employees of the Authority." *Transcaribbean* at 7. In this context, the holding in *Transcaribbean* is narrow and not indicative of a Commonwealth viewpoint that

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[5] Two years earlier, the 1st Circuit found that PRPA was an arm of the Commonwealth and entitled to 11th Amendment immunity. *Puerto Rico Ports Authority v. M/V Manhattan Prince, et al.*, 897 F.2d 1 (1st Cir 1990). In that case, which was a tort action alleging negligence by a PRPA-licensed harbor pilot, the court concluded that PRPA's licensing of the harbor pilot was not a proprietary function, but rather a governmental one, exercised by it as an arm of the Commonwealth.

[6] The plaintiff, Transcaribbean Maritime Corp., also based its claim on the Federal Civil Rights Act, 42 U.S.C. § 1983, the Civil Rights Act of Puerto Rico, 1 L.P.R.A. §§ 13-18, and the Shipping Act of 1984. *Transcaribbean* at 2.

PRPA is not arm of the Commonwealth with regard to claims of constitutional sovereign immunity.

B. Prior Commission Applications of the Ceres Analysis

It appears that the factors in this proceeding weigh at least as strongly in favor of arm-of-the-state status as those of *Ceres* and *Carolina Marine*. We also note that the types of activities that are the gravamen of the complaints in the instant proceedings—the leasing of marine terminal facilities—are exactly the same kinds of activities that were subject to review in *Ceres* and *Carolina Marine*. In *Ceres*, the Commission concluded that MPA had not proven that any judgment against it would be paid from state funds and still found it to be an arm of the state. As for the degree of control, the Commission noted that the indicators were mixed, but nonetheless concluded that Maryland exercises significant control over MPA. The Commission further noted that "the provenance of the officials who run MPA suggests that they are political appointees who are compensated by the state and are intended to be answerable to the state." *Ceres* at 369. The Commission next concluded that MPA exercised authority over statewide concerns and that its oversight of maritime commerce is an essential function to the state of Maryland. As for the remaining issue, how state law treats MPA, the Commission merely noted that one local court had held MPA immune from suit in state court.

In *Carolina Marine*, the Commission had another opportunity to determine whether certain entities were arms of the state. The Commission affirmed the ALJ's dismissal of South Carolina State Ports Authority ("SCSPA") as a party to the proceeding, relying on the prior determination that SCSPA is an arm

of the state of South Carolina.[7] The Commission then considered whether the Charleston Naval Complex Redevelopment Authority ("RDA") is an arm of the state of South Carolina under the *Ceres* test. It ultimately concluded that RDA is an arm of the state.

As for degree of control, the Commission noted that: 1) RDA had authority to carry out redevelopment projects and to act as an agent for the state; 2) two of RDA's nine members are representatives of the state and that the others are appointed with the advice and consent of the S.C. Senate; 3) RDA could dissolve itself by a 2/3 vote; 4) RDA members must comply with a state ethics act; 5) RDA must comply with the South Carolina procurement code; and 6) RDA's operations were reviewed by a special legislative committee. After reviewing RDA's legislative mandate, the Commission concluded that RDA deals with statewide concerns. The Commission noted that "ports in the U.S. serve as vital gateways to international commerce, impacting the economies of their respective states." *Carolina Marine* at 1032.

Turning to the manner in which state law treats RDA, the Commission noted that RDA's enabling act stated that it is "a public body, corporate and politic, exercising public and essential governmental powers . . . ." *Carolina Marine* at 1033. RDA is an agency of South Carolina under the South Carolina Torts Claims Act. RDA is also the sole representative of the state in negotiating with the federal government. Lastly, the Commission noted that RDA must provide notice of its meetings to the media and public. The Commission also found that a judgment against RDA

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[7] Citing *Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051 (4th Cir. 1995).

might impinge on the state fisc. It noted that RDA would likely seek funds from South Carolina for payment of a reparations award exceeding its existing funds.

Of course, the Commission does not need to find a risk to the treasury in order to find that PRPA is an arm of the state. In *South Carolina State Ports Authority*, in response to the United States' argument that actions before the FMC do not implicate the financial integrity of states, the Court noted:

> This argument . . . reflects a fundamental misunderstanding of purposes of sovereign immunity. While state sovereign immunity serves the important function of shielding state treasuries and thus preserving 'the States' ability to govern in accordance with the will of their citizens,' the doctrine's central purpose is to 'accord the States the respect owed them as joint sovereigns.' 535 U.S. at 765 (citations omitted).[8]

Furthermore, in *Ceres* itself, the Commission found no risk to Maryland's treasury and still determined that the Maryland Port Administration was an arm of the state.

C. Sovereign's Views

A majority of the Commissioners accepts the clear statement of the Commonwealth that it considers PRPA to be an arm of the Commonwealth. *Majority Opinion* at 29. The Commonwealth's filing came into the record as follows. On February 15, 2005, Odyssea

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[8] The Supreme Court did not address whether SCSPA was an arm of the State of South Carolina, but simply affirmed the judgment of the Court of Appeals.

filed a Reply Memorandum in response to the Commission's Order of November 22, 2004 ("Odyssea Reply"). In this document, Odyssea first noted that the Office of the Solicitor General of the Commonwealth of Puerto Rico had filed a petition to file an *amicus curiae* brief in that proceeding. Odyssea then stated that it ". . . does not object to the receipt and consideration of the submission by the Commonwealth of Puerto Rico. It is the position of Odyssea that the involvement of the Commonwealth in these proceedings is long overdue." *Odyssea Reply* at 2. Odyssea further stated that, "since the Common-wealth has now appeared and inserted itself in these proceedings, the matter is ripe for an *order to show cause*[9] to be issued to BOTH the Solicitor General and counsel to PRPA."[10] In its prayer for relief, therefore, Odyssea asked the Commission to issue such an order.[11]

In response to Odyssea's petition requesting that the Commission issue a show cause order, PRPA filed an "Opposition to Odyssea's Petition for a Show Cause Order" on March 2, 2005. In addition, on March 9, 2005, the Commonwealth of Puerto Rico filed a "Response to Odyssea's Request for an Order to Show Cause." In its response, the Commonwealth's Solicitor General made the following representations on behalf of the Commonwealth: ". . . the Commonwealth has allowed the Ports Authority to characterize itself as an arm of the Commonwealth because the Commonwealth fully agrees that the Ports Authority is an arm of the Commonwealth." *Response to Odyssea's Request for an Order to Show Cause* at 2

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[9] *Odyssea Reply* at 2 (emphasis added).

[10] *Id.* (emphasis in original).

[11] *Id.*, at 17.

(emphasis in original). The Commonwealth further explained that the reason it had not expressed itself sooner on this issue was because it had not been asked to do so. *Id.*

Here, the key issue before us is whether the Commission might offend the dignity of a sovereign, the Commonwealth of Puerto Rico, by entertaining private-party complaints against it or one of its arms or constituent entities. In this regard, the view of the sovereign on the issue of whether PRPA is an arm of the Commonwealth takes on particular significance. We agree with the Commission minority in *Carolina Marine* that the views of the sovereign should be considered, if available, in making our determination. *Carolina Marine* at 1040 (pointing out that "South Carolina has remained silent on whether it intended to confer arm of state status on RDA") and at 1041 (noting that "nowhere in the record does RDA convincingly show on its own behalf that South Carolina characterizes or treats RDA as a state agency with arm of the state status"). In the instant case, we have a clear statement on behalf of the Commonwealth of Puerto Rico that it considers PRPA to be an arm of the Commonwealth for all purposes. We should accord its views due deference.

D. Conclusion

Based on the foregoing, we believe that the facts relating to control, statewide concerns, and state-law treatment of the entity establish that the Puerto Rico Ports Authority is an arm of the Commonwealth of Puerto Rico. In conducting an arm-of-the-state analysis, there is no reason to give each factor equal weight. In fact, some factors will obviously be of greater importance. For example, in the instant case, the legislature created PRPA to oversee the maritime

and air transportation systems for an island commonwealth of four million people. The fact that Puerto Rico is an island makes the statewide, economic significance of the Ports Authority especially clear, and more important than it might be in certain mainland jurisdictions. We also find it particularly significant that four out of the five members of PRPA's Board of Directors are members of the Governor's cabinet and serve at his or her pleasure. Lastly, the Solicitor General has stated, on behalf of Puerto Rico, that it believes that PRPA is an arm of the Commonwealth of Puerto Rico.

APPENDIX C

LAWS OF PUERTO RICO
ANNOTATED
1999 Ed.

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§ 331. Short title

Sections 331-352 of this title shall be known as the Puerto Rico Ports Authority Act.

§ 332. Definitions

The following terms, wherever used or referred to in sections 331-352 of this title shall have the following meanings except where the context clearly indicates otherwise:

(a) Authority. Means the Puerto Rico Ports Authority created by sections 331-352 of this title.

(b) Bonds. Means the bonds, temporary bonds, refunding bonds, debentures, notes, provisional or interim bonds, receipts, certificates, or other evidences of indebtedness or obligations which the Authority is authorized to issue pursuant to sections 331-352 of this title, but shall not include the debts or accounts incurred in the usual course of business for expenses of the Authority.

(c) Executive Director. Shall mean the Executive Director of the Authority.

(d) Board or *Board of Directors.* Shall mean the Board of Directors of the Authority.

(e) Undertaking. Means any piece or pieces of property, or combination thereof, whether real, personal or mixed, owned, operated, managed, controlled or used by the Authority, or intended to be so owned, operated, managed, controlled or used, in connection

with any of its activities, including, but without limitation, any system or systems, ships and aircrafts, offices, equipment, supplies, fuel, energy, services, facilities, structures, plants, vehicles and rolling stock, together with all parts and appurtenances thereof, that are or may be used, useful or convenient in conducting any of the activities or services usually performed by public carriers and shipping and aircraft enterprises devoted to the transportation of persons or cargo or activities or services auxiliary or supplemental thereto.

The word "undertaking" shall also mean air and marine terminals as hereinafter defined:

(1) Air terminal. Shall mean a development consisting of runways, hangars, control towers, ramps, quays, bulkheads, buildings, structures, parking areas, improvements, facilities, or other real property necessary, suitable, or desirable for the landing, taking off, accommodation, and servicing of aircraft of all types, including airplanes, dirigibles, helicopters, gliders, amphibians, seaplanes, or any other contrivance now or hereafter used for the navigation of or for the flight in space, operated by public carriers engaged in the transportation of passengers or cargo; or for the loading, unloading, interchange or transfer of such passengers or their baggage or of such cargo; or otherwise for the accommodation, use or convenience of such passengers, or of the said carriers or their employees, or of persons visiting the airport; or for the landing, taking off, accommodation, and servicing of aircraft owned or operated by persons other than carriers.

(2) Marine terminals. Means developments consisting of one or more piers, wharves, docks, bulkheads, slips, basins, vehicular roadways, railways,

railroad connections, side tracks, sidings or other buildings, structures, facilities or improvements, necessary or convenient to the accommodation of steamships or other vessels and their cargo and passengers.

(f) Federal agency. Means the United States of America, the President or any Department thereof, or any corporation, agency, or instrumentality heretofore or hereafter created, designated, or established by the United States of America.

(g) *Holder of bonds* or *bondholder* or any similar term. Means any person who is the bearer of any outstanding bond or bonds registered to bearer or not registered or the registered owner of any outstanding bond or bonds which at the time are registered other than to bearer.

(h) Words importing the singular number include the plural number and vice versa, and words importing persons shall include firms, partnerships of all kinds and corporations.

(i) Emergency. Shall mean a situation which involves nondeferable, unexpected, and unforeseen public needs that are caused by tragic and unfortunate events or circumstances beyond human control, which require immediate action because the life or health of one or more than one person is in danger, because public property is in danger of being damaged or lost or because public services could be suspended or adversely affected. Said situation must be established through a resolution approved by the Board of Directors of the Authority indicating the nature of said emergency and providing evidence thereof.

§ 333. Creation of Puerto Rico Ports Authority

(a) A body corporate and politic is hereby created constituting a public corporation and government instrumentality of the Commonwealth of Puerto Rico, with the name of the Puerto Rico Ports Authority. The Puerto Rico Ports Authority shall be the successor of the Puerto Rico Transportation Authority for all effects, including, but without it being understood as a limitation, the collection and payment of debts and obligations pursuant to the terms thereof.

(b) The Authority which is created hereby is and should be a government instrumentality and public corporation with a legal existence and personality separate and apart from those of the Government and any officials thereof. The debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings and properties of the Authority, its officers, agents or employees, shall be deemed to be those of said government controlled corporation, and not those of the Commonwealth of Puerto Rico, or any office, bureau, department, commission, dependency, municipality, branch, agent, officials or employees thereof.

§ 334. Executive powers

The Ports Authority shall be governed by a Board of Directors composed of the Secretary of Transportation and Public Works, the Economic Development Administrator, the Secretary of Commerce, the Executive Director of the Tourism Company and one private citizen representing the public interest. The latter shall be appointed by the Governor with the advice and consent of the Senate for a term of four (4) years, and until his successor is designated. Subject to prior filing of charges, notice and hearing, the

Governor may remove the representative of the public interest from office for negligence in the performance of his/her duties, conviction of a felony or a misdemeanor that implies moral turpitude, repeated and unjustified absences from Board meetings, conflicts of interest or total and permanent disability to perform the functions of the office. A vacancy of the member representing the public interest that arises before the term expires, shall be filled through a new appointment for the unexpired term. The Governor shall fill the vacancy of the member representing the public interest within a period that shall not exceed sixty (60) days, after it has occurred. A majority of the members of the Board of Directors shall constitute a quorum for all purposes and its agreements shall be by a majority of those present.

The member of the Board that represents the public interest shall be entitled to receive compensation of fifty (50) dollars per day, or fraction thereof, that he attends a duly summoned meeting.

The Secretary of Transportation and Public Works shall be the Chairperson of the Board. The Board of Directors shall elect the other officers that it deems are needed from among its members. It shall meet at least once a month in a regular meeting, and may meet as many times as it deems pertinent in special meetings upon prior summons by the Chairperson.

In exceptional cases or those of force majeure, the Economic Development Administrator, the Secretary of Commerce and the Executive Director of the Tourism Company may delegate their representation on the Sub-Administrator of Economic Development, the Under-Secretary of Commerce and the Sub-Director of the Tourism Company, respectively. In no case

should the absences of the agency chiefs who compose the Board exceed four (4) times a year.

Provided That, no person who has an indirect or direct economic interest in any private industry engaged in the transportation business or in any business whose primary activities are auxiliary to the same, may hold office as a Board member. When such incompatibility affects a Board member other than the representative of the public interest, the vacancy so created shall be filled for the duration of such incompatibility, by the official that is next in hierarchy in that agency. The above shall not constitute a limitation to the Governor's power to remove the public interest representative from office, subject to the causes established in this section.

The Board created by virtue of sections 331-352 of this title shall have, without its being construed as a limitation, the following duties and faculties:

(a) To establish the general policy to comply with the objectives of sections 331-352 of this title;

(b) To authorize the Authority's annual working plan and budget;

(c) To appoint the Authority's Executive Director, establish his/her duties in harmony with what is provided by sections 331-352 of this title, and fix his/her compensation;

(d) To adopt and approve regulations that govern its internal operation, as well as those that are needed to carry out the faculties and powers that have been conferred to it by sections 331-352 of this title;

(e) To require any reports and statistical data that it deems necessary from the Executive Director or any other official or employee of the Authority;

(f) Delegate on the Executive Director whatever powers and faculties are needed to carry out the objectives provided by sections 331-352 of this title;

(g) To perform any act that is convenient or necessary in order to carry out the objectives provided in sections 331-352 of this title.

§ 335. Executive director

The Authority shall operate under the direction of an Executive Director who shall be appointed by the Board and shall hold office at the will of the latter. His/her functions shall be the following, without being limited thereto:

(a) To be the Authority's chief executive officer.

(b) To prepare and present the Authority's annual working plan and budget to the Board of Directors.

(c) To authorize and supervise every contract that is needed for the Authority's operation, subject to the norms established by the Board.

(d) To attend all Board meetings, but shall not be entitled to vote.

(e) To establish, organize, direct and supervise the Authority's administrative structure.

(f) To establish the functional levels of the Authority's operations, including the power to recruit and contract any of the officers and employees under his/her supervision, subject to the norms that the Board may establish.

(g) To carry out all functions that are assigned to him/her by the Board.

§ 336. Powers

The purposes of the Authority shall be to develop and improve, own, operate, and manage any and all types of air and marine transportation facilities and services, as well as to establish and manage mass marine transportation systems in, to and from the Commonwealth of Puerto Rico on its own, or in coordination with other government, corporate or municipal entities, and make available the benefits thereof in the most extensive and least costly manner, thereby promoting the general welfare and increasing commerce and prosperity; and the Authority is granted, and shall have and may exercise all rights and powers that are necessary or convenient to carry out the aforesaid purposes, including the following, but not without limiting the generality of the foregoing:

(a) To have perpetual existence as a corporation.

(b) To adopt, alter, and use a corporate seal, which shall be judicially noticed.

(c) To prescribe, adopt, amend, and repeal bylaws governing the manner in which its general business may be conducted and the powers and duties granted to and imposed upon it by law may be exercised and performed.

(d) To have complete control and supervision of any undertaking constructed or acquired by it including the power to determine the character of and necessity for all its expenditures and the manner in which they shall be incurred, allowed and paid without regard to the provisions of any laws governing the expenditure

of public funds, and such determination shall be final and conclusive upon all officers of the Commonwealth of Puerto Rico, and to prescribe, adopt, amend, and repeal such rules and regulations as may be necessary or proper for the exercise and performance of its powers and duties or to govern the rendering, sale, or exchange of transportation service or facilities.

(e) To sue and be sued.

(f) To make contracts and to execute all instruments necessary or convenient in the exercise of any of its powers.

(g) To prepare, or cause to be prepared, plans, designs, and estimates of costs for the construction, reconstruction, extension, improvement, enlargement, or repair of any undertaking or any part or parts thereof, and from time to time to modify such plans, designs, or estimates.

(h) To acquire in any lawful manner including, but without limitation, acquisition by purchase, whether by agreement or by the exercise of the power of eminent domain, lease, bequest, devise, gift, and to hold, maintain, use and operate any undertaking or part or parts thereof.

(i) To acquire in the manner set forth in subsection (h) hereof, produce, develop, manufacture, hold, conserve, use, distribute, supply, exchange, sell, rent and otherwise dispose of any and all equipment, supplies, services, goods, and such other property real and personal as the Authority shall deem necessary, proper, incidental, or convenient in connection with its activities.

(j) To acquire in the manner set forth in subsection (h) of this section hereof and to hold and use any

property, real, personal, or mixed, tangible or intangible, or any interest therein, deemed by it to be necessary or convenient for carrying out the purposes of the Authority, and (subject to the limitations contained in sections 331-352 of this title) to lease as lessor, or exchange, any property or interest therein at any time acquired by it.

(k) To construct, reconstruct, and operate any undertaking or any part or parts thereof, and any additions, improvements, and extensions to any undertaking of the Authority by contract or contracts, or under, through, or by means of its own officers, agents, and employees.

(*l*)(1) To determine, fix, alter, impose and collect rates, fees, rents and other charges for the use of the facilities or services of the Authority, or other commodities sold, rendered, or furnished by the Authority, which shall be fair and reasonable. Said rates, fees, rents and other charges, shall be sufficient, at least to:

(A) Cover the expenses incurred by the Authority for the preservation, development, improvement, extension, repair, conservation and operation of its installations, facilities, properties and services;

(B) pay principal and interests on any of the Authority's bonds and to comply with the terms and provisions of the agreements made with, or for the benefit of the purchasers or holders of said bonds, and

(C) encourage the use of the Authority's facilities and services in the most ample and varied manner that is financially feasible.

The Board may make changes to the general rate structure and if it deems that their immediate effectiveness is necessary in case of a temporary or emergency increase, it will file the rate regulations at the Department of State in accordance with the provisions of sections 2101 et seq. of Title 3 and will hold a hearing within thirty (30) days of their filing.

(2) To determine, fix, alter, impose and collect rates, fees, rentals and other charges for the use of the facilities owned and the services in the International Airport and the other airports owned and operated by the Ports Authority, as well as the maritime and port facilities owned or operated by the Authority, all the standards established in clause (1) of this subsection shall be met. Without it being construed as a limitation of said standards, the following criteria shall be also be followed as discretionary guidelines which can be used to determine the reasonability of said rates, fees, rentals and other charges:

(A) Any fee or charge on aviation fuel which the Authority may receive shall not be taken into account for the purpose of compensating the expenses thus producing some kind of reduction in the rates, fees, rentals and other charges that the users should pay to the airports.

(B) The income of the Authority by reason of a grant, lease or other similar service in the airports shall not be taken into account for the purpose of compensating the expenses thus producing some reduction in the rates, fees, rentals and other charges that the users thereof must pay.

(C) Through the general structure of rates, fees, rentals and other charges, the Authority shall recover:

(i) A reasonable portion of the expenses of the Central Office of the Authority, after deducting the reasonable proportion that may correspond to the Isla Grande Division.

(ii) The expenses of the Aviation Department of the Authority, including the management, operation and maintenance expenses.

(iii) The interest on the total of the investment of the Commonwealth of Puerto Rico and of the Authority, including both the depreciable assets and nondepreciable assets.

(iv) Charges for depreciation on all depreciable assets existing in airports as a result of the investments made therein by the Commonwealth of Puerto Rico and by the Authority.

(D) In the landing strips, in the passenger and freight terminals and in the other facilities of each airport there shall be established divisions and subdivisions separated from costs for the purpose of determining what should reasonably be collected for the use of the facilities or services of each one of said divisions and subdivisions.

(E) Upon fixing rates and other charges at passenger terminals, the costs of the waiting and public circulation space shall be distributed among the lessees who occupy the rentable area.

(F) Upon fixing rentals and other charges in the passenger terminals the costs of the baggage-claim area and adjacent areas for baggage cars shall be dis-

tributed exclusively among the airlines using said areas.

(G) Upon fixing the rates and other charges for the use of landing strips there shall be used as a unit of measurement the maximum gross weight authorized to the airplane for the taking off, and there shall not be granted deduction for quantity.

(H) Upon fixing the rates and other charges for the use of landing strips as concerns air carriers operating in Puerto Rico or between Puerto Rico and the Virgin Islands showing higher operation costs or a capacity to pay less than those carriers operating between Puerto Rico and the Continental United States or between Puerto Rico and foreign countries, there shall be established a reasonable differential for the "local" flights, that is, flights to points located in Puerto Rico and in the Virgin Islands, so that for said flights the rates, fees and charges be proportionally lower than the rates, fees and charges applicable to flights to the Continental United States or foreign countries.

(I) Through the general structure of rates, fees, rentals and other charges, the Authority shall recover any other increases as may be necessary or convenient to allow or facilitate the issuance of the bonds that the Authority may from time to time determine to authorize, issue, sell or have in circulation in accordance with the provisions of sections 331-352 of this title.

(J) Upon fixing the rentals and other charges that the Authority shall impose upon, and collect from the users who are not air carriers, there shall be taken into consideration that such users must pay such rates, fees, rentals and other charges so as to

render the maximum economic yield to the Ports Authority.

(3) The Authority's administrative procedures shall be governed by sections 2101 et seq. of Title 3, and by the regulations adopted by the Board thereunder.

[No question, objection or error may be taken before the court nor may be considered by the latter, if same has not been taken expressly and on time before the Administrator. The findings of facts to which the Administrator may arrive shall be final and the modification or revocation of any order or resolution shall only take place if no rational ground exists of an adequate right to sustain it. The appeal for review shall not produce the suspension of the order or resolution challenged, unless the court may determine as necessary to suspend it so as to avoid irreparable damages to the petitioner and it thus provides, upon the previous giving of a bond, to guarantee the total payment of the rentals, fees and other charges involved in each action, plus a reasonable sum to answer for the professional fees.

The judgment given by the Court of First Instance, San Juan Part, shall be final and may only be reviewed by the Supreme Court by a writ of certiorari issued at its discretion and not otherwise].

(m) To appoint such officers, agents, and employees and vest them with such powers and duties, and to fix, change, and pay such compensation for their services as the Authority may determine.

(n) To borrow money, make and issue bonds of the Authority for any of its corporate purposes or for the purpose of financing, refinancing, paying or discharging any of the outstanding or assumed bonds or

obligations and to secure payment of its bonds and of any and all other obligations by pledge or mortgage of any other lien on all or any of its contracts, revenues, income or property.

(o) To make and issue bonds for the purpose of funding, refunding, purchasing, paying, or discharging any of the outstanding bonds or obligations issued or assumed by it or any bonds or obligations the principal or interest of which is payable in whole or in part from its revenues.

(p) To accept grants from, and enter into contracts, leases, agreements, or other transactions with, any federal agency, the Commonwealth of Puerto Rico, or political subdivisions of the Commonwealth of Puerto Rico, and to expend the proceeds of any such grants for any corporate purposes.

(q) To sell, or otherwise dispose of any real, personal or mixed property or any interest thereon, that in the judgment of the Board is no longer needed for the Authority's business or to carry out the purposes of sections 331-352 of this title.

(r) To enter on any lands, waters, or premises, after notifying the owners or holders thereof, or their representatives, for the purpose of making surveys, soundings, or examinations.

(s) To acquire, hold and dispose of stock, membership rights, contracts, bonds or other interest in other corporations and to exercise any and all powers and rights related to them and obtain the organization in accordance with the law and exercise partial or complete control over subsidiary, affiliated or associate corporations provided that, in the Board's opinion, such an arrangement is necessary, appropriate or convenient to carry out the purposes of the Authority

or the exercise of its powers; and sell, lease, donate or otherwise grant any of the Authority's property, or delegate or transfer any of its rights, powers, functions or duties to any of these corporations that are subject to its control. The aforementioned power to delegate or transfer shall not be extended to the right to expropriate or fix rates which must be exercised directly by the Authority.

(t) All grants of franchises, rights and privileges of public or quasi-public nature to public carriers of persons or property made by the Public Service Commission shall contain provisions requiring the grantee thereof to comply with the regulations of the Authority and providing for the termination of said franchise upon failure so to comply.

(u) The Authority shall obtain, by electronic or manual means, the necessary statistical data regarding the number of travelers, expenses incurred, satisfaction and interests of same, among others, from the air and marine transport companies that use its facilities, to develop a data base for effective planning and marketing of tourism activities, and such data shall be confidential in nature, and the detailed, aggregated figures shall be available to students, universities, press, government agencies, and the tourism businesses that supply same, as well as to potential investors, with prior request submitted to the Authority. This provision shall not diminish the powers granted to other agencies, dependencies, or instrumentalities of the Commonwealth of Puerto Rico that handle matters of this same sort.

The Authority shall approve a regulation to ensure compliance with this subsection within a term of ninety (90) days after the approval of this act.

(v) To do all acts or things necessary or convenient to carry out the powers granted to it by sections 331-352 of this title or by any other act of the Legislature of Puerto Rico, or by any act of the Congress of the United States; Provided, however, That the Authority shall have no power at any time or in any manner to pledge the credit or taxing power of the Commonwealth of Puerto Rico or any of its political subdivisions, nor shall the Commonwealth of Puerto Rico or any of its political subdivisions be liable for the payment of the principal or of interest on any bonds issued by the Authority.

§ 337. Officers and employees

(a) Appointments, removals, promotions, transfers, terminations, reinstatements, layoffs, leaves and changes in position, compensation or title of the officers and employees of the Authority will be made and allowed as provided by the norms and regulations prescribed by the Board, which must be in conformity with the merit principles established in section 1301 et seq. of Title 3, known as the Public Service Personnel Act of Puerto Rico. The Executive Director and the Authority's officers and employees shall be entitled to reimbursement of necessary travel expenses, or in lieu of them, to the corresponding per diem as authorized or approved in accordance with the regulations adopted by the Board for the Authority. The officials and employees of any board, commission, agency or department of the Commonwealth of Puerto Rico who are appointed by the Authority and who prior to such an appointment were beneficiaries of any savings and loan fund system, shall continue to have after such appointment, the rights, privileges, obligations and status, with respect thereto that are prescribed by law for the officers and employees who

hold similar positions in the Government of the Commonwealth of Puerto Rico, unless within a term of six (6) months after such an appointment said officers and employees or any of them, indicate an intention to relinquish them.

(b) No person who has a direct or indirect economic interest in any private industry engaged in the transportation business, or any business whose principal activities are auxiliary to it, shall hold office as an officer, employee or agent of the Authority.

§ 338. Monies and accounts of Authority

All monies of the Authority shall be deposited in qualified depositaries for funds of the Government of the Commonwealth of Puerto Rico, but they shall be kept in a separate account or accounts registered in the name of the Authority. The disbursements shall be made by it pursuant to the regulations and budgets approved by the Board.

The Secretary of the Treasury, in consultation with the Authority, shall establish the accounting system that is required for the adequate statistical control and registration of all expenses and income belonging to, or managed or controlled by the Authority. The Secretary of the Treasury shall require that the Authority's accounts be kept in such a manner that the accounts related to the different types of operations, projects, enterprises and activities of the Authority can be appropriately segregated insofar as it is advisable. The Controller of Puerto Rico or his/her representative shall examine the Authority's accounts and books every three (3) years or in shorter periods when it is deemed necessary, including its income, disbursements, contracts, leases, sinking funds, investments and any other matters related to its economic

situation and shall render a report thereof to the Board, the Governor of Puerto Rico and the Legislature.

§ 339. Acquisition of property by Commonwealth for the Authority

By request of the Authority, the Governor of Puerto Rico or the Department of Transportation and Public Works through its Secretary, shall have the power to purchase in the name or on behalf of the Commonwealth of Puerto Rico any property title or interest thereon that the Board deems necessary and convenient for its purposes, either by agreement or by the exercise of the right to eminent domain, or by any other legal means. The authority may make available to said officers the funds that are needed to pay for said property in advance, and once it has been acquired it may reimburse the Government of the Commonwealth for any amount paid that was not previously delivered. Upon such reimbursement to the Commonwealth Government, (or within a reasonable time as determined by the Governor if the total cost or price has been previously advanced by the Authority), the title to the property so acquired will pass to the Authority. The Secretary of Transportation and Public Works, with the Governor's approval, may make those arrangements that he/she deems appropriate for the exploitation and control of said property by the Authority in benefit of the Commonwealth Government during the period that elapses before said title passes to the Authority. The power conferred hereby will not limit nor restrict in any manner or to any extent the power of the Authority itself to acquire property. The title of any property of the Commonwealth of Puerto Rico previously acquired or to be acquired in the future, and

deemed necessary or convenient for the purposes of the Authority, may be transferred to it by the officer in charge or having custody of said property, under the terms and conditions to be fixed by the Governor of Puerto Rico.

§ 339a. Taking possession of property in condemntion proceedings

When in the judgment of the Authority it be necessary to take immediate possession of the properties which are to be condemned, the Authority shall request from the Governor of Puerto Rico who, in behalf of the Commonwealth of Puerto Rico, acquires, and the latter shall have power to acquire by purchase, condemnation or by any other lawful means for the use and benefit of the Authority, the properties and real rights necessary and convenient to carry out the purposes and aims thereof. The Authority shall place in advance, at the disposal of the Commonwealth of Puerto Rico, the necessary funds that may be estimated as the value of the properties or of the rights to be acquired. The difference in value that the court may decree may be paid from the Commonwealth Treasury, but the Authority shall be under the obligation to reimburse said difference. After the totality of the reimbursement has been made the title of said property shall be transferred to the Authority by order of the court, by record substantiated to the effect, it being provided that in such cases where the Governor of the Commonwealth of Puerto Rico deems necessary and convenient that the property title and/or right so acquired should be recorded directly in behalf of the Authority to accelerate the fulfillment of the purposes and aims for which it was created, he may so request from the court at any time within the condemnation proceedings and is so ordered by the

latter. In such cases, the registrar of property shall preferably proceed to make the recording of the property title or rights in question in behalf of the Puerto Rico Ports Authority, upon presenting for recording the pertinent instrument. The power hereby conferred, shall not limit, or restrict in any manner the power of the Authority itself to acquire property.

All personal and real properties and any right or interest thereon that the Authority deems necessary to acquire to carry out its purposes are hereby declared of public utility and same may be condemned by the Authority or at its request and for the use and benefit of the latter by the Commonwealth of Puerto Rico, represented by its Governor, without the previous declaration of public utility provided in section 2902 of Title 32.

§ 340. Grant of property by municipalities, etc

All municipalities and political subdivisions of Puerto Rico, notwithstanding any contrary provision of law, are authorized to grant and convey to the Authority, upon its request and upon reasonable terms and conditions, any property or interest therein (including property already devoted to public use) which the Authority may deem necessary or convenient to effectuate the purposes of the Authority. The Authority shall have the right and power to construct or place any part or parts of any of its undertakings across, in, over, under, through or along any street, public highway, or any lands which are now or may hereafter be the property of the Commonwealth Government or any municipality or political subdivision thereof, without obtaining any franchise or other permit therefor. The Authority shall restore any such street, highway, or lands, as nearly as may be, to their condition or state at the beginning of the work,

and shall not use the same in a manner to impair unnecessarily their usefulness.

§ 341. Construction and purchase contracts

All purchases and contracts for supplies or services, except personal services, made by the Authority, including contracts for the construction of its works, shall be made after an advertisement for bids is issued sufficiently in advance of the opening of bids, so that the Authority may secure proper notice and opportunity for competition; Provided, That when the sum estimated for the purchase does not exceed ten thousand (10,000) dollars, and when the value of the construction work does not exceed twenty-five thousand (25,000) dollars, the aforesaid may be carried out without advertisement for bids. For purchases whose value fluctuates between one thousand (1,000) and ten thousand (10,000) dollars and when the value of the construction work does not exceed twenty-five thousand (25,000) dollars, the Authority shall solicit quotations from at least three (3) supply sources. On the other hand, neither advertisements for bids nor requests for quotations shall be required:

(1) When immediate delivery of the materials, supplies and equipment, or performance of services or construction works are required, due to an emergency, as said term is defined in this chapter,

(2) when spare parts, accessories or supplementary equipment or services are required for supplies or services previously furnished or contracted;

(3) when professional or expert services or work [is] required and the Authority deems that in the best interests of a good administration said services or works be contracted without said advertisements; or

(4) when prices are non-competitive because there is only one source of supply or because they are regulated by law; or

(5) when the Authority has called for two bids with identical specifications, terms and conditions within a six (6) month period from the opening date of the first, provided that no one participated in said bidding. In such cases, the purchase of materials, supplies, equipment or the procurement of such services may be made in the open market following the usual commercial practices. When comparing bids and granting awards, due consideration shall be given to such factors (in addition to whether the bidder has complied with the specifications) as the lowest price; the capacity of the bidder to perform construction work of the kind involved in the contract under consideration; the relative quality and adaptability of the materials, supplies and equipment used or the services provided; the financial responsibility of the bidder and skills, experience, and reputation for his/her integrity in doing business, and the capacity for providing repair and maintenance services; as well as the time of delivery and performance offered. The Authority may prescribe regulations for submitting bids.

§ 342. Bonds of the Authority

(a) By authority of the Government of Puerto Rico, granted hereby, the Puerto Rico Ports Authority may from time to time issue and sell its own bonds and have them outstanding.

(b) The bonds may be authorized by resolution or resolutions of the Board approved by a majority vote of the members thereof and may be of such series, may bear such date or dates, may mature at such

time or times not exceeding fifty (50) years from their respective dates; may bear interest at such rate or rates not exceeding the maximum rate allowed by the law at the time, may be in such denomination or denominations, may be in such form either coupon or registered; may bear such registration or conversion privileges, may be executed in such manner, may be payable in such medium of payment and at such place or places; may be subject to such terms of redemption, with or without premium, may be declared due or become due at such time before the maturity date thereof, may provide for the replacement of mutilated, destroyed, stolen or lost bonds, may be authenticated in such manner and upon compliance with such conditions, and may contain such other terms and covenants as such resolution or resolutions may provide. The bonds may be sold at public or private sale for such price or prices as the Authority shall determine; provided, that refunding bonds may be exchanged for outstanding bonds of the Authority on such terms as the Board may deem to be in the best interests of the Authority. Notwithstanding the form and tenor thereof, and in the absence of an express recital on the face thereof that the bond is non-negotiable, all bonds of the Authority shall at all times be, and shall be understood to be, negotiable instruments for all purposes.

(c) The bonds of the Authority bearing the signature of the officers of the Authority in office on the date of the signing thereof shall be valid and binding obligations, notwithstanding that before the delivery thereof and payment therefor any or all of the officers whose signatures or facsimile signatures appear thereon shall have ceased to be such officers of the Authority. The validity of the authorization and issuance of the bonds shall not be dependent on or af-

fected in any way by any proceedings relating to the construction, acquisition, extension, or improvement of the undertaking for which the bonds are issued, or by any contracts made in connection with such undertaking. Any resolution authorizing the bonds may provide that any such bond may contain a recital that it is issued pursuant to sections 331-352 of this title, and any bond containing such recital under authority of any such resolution shall be conclusively deemed to be valid and to have been issued in conformity with the provisions of sections 331-352 of this title.

(d) Pending the execution and delivery of definitive bonds, temporary or interim bonds, receipts or certificates may be issued in such form and with such provisions, as may be provided in such resolution or resolutions.

(e) Any resolution or resolutions authorizing any bonds may contain provisions, which shall be a part of the contract with the holders of the bonds:

(1) As to the disposition of the entire gross or net revenues and present or future income of the Authority, including the pledging of all or any part thereof to secure payment of the bonds;

(2) as to the rates to be charged, and the application, use, and disposition of the amounts that may be raised by the collection of such rates and from other receipts of the Authority;

(3) as to the setting aside of reserves for amortization funds, and the regulation and disposition thereof;

(4) as to limitations on the right of the Authority to restrict and regulate the use of any undertaking or part thereof;

(5) as to limitations on the purpose to which the proceeds of sale of any issue of bonds then or thereafter to be issued may be applied;

(6) as to limitations on the issuance of additional bonds;

(7) as to the procedure by which the terms of any resolution authorizing bonds or any other contract with the bondholders may be amended or abrogated, and the amount of the bonds the holders of which must consent thereto, and the manner in which such consent may be given;

(8) as to the amount and kind of insurance to be maintained on the undertakings of the Authority, and the use and disposition of insurance monies;

(9) covenanting against pledging all or any part of the revenues and income of the Authority to which its right then exists or the right to which may thereafter come into existence;

(10) as to events of default and terms and conditions upon which any or all of the bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived;

(11) as to the rights, liabilities, powers and duties arising upon the breach by the Authority of any of its covenants, conditions, or obligations;

(12) as to the investing a trustee or trustees the right to enforce any covenants made to secure, to pay, or in relation to the bonds; as to the powers and duties of each trustee or trustees, and the limitation of the liabilities thereof; and as to the terms and conditions upon which the holders of the bonds or any proportion or percentage of them may enforce any cove-

nants made under sections 331-352 of this title or duties imposed hereby;

(13) as to the manner of collecting the rates, fees, rentals, or other charges for the services, facilities, or commodities of undertakings of the Authority, and the combining in one bill of the rates, fees, rentals, or other charges for the services, facilities, or commodities of any two or more of such undertakings;

(14) as to the discontinuance of the services, facilities, or commodities of any undertaking of the Authority, in the event that the rates, fees, rentals, or other charges for the services, facilities, or commodities of such undertaking are not paid; and

(15) as to any other acts and things not inconsistent with sections 331-352 of this title that may be necessary or convenient for the security of the bonds, or as may tend to make the bonds more marketable.

(f) Neither the Members of the Authority nor the Economic Development Administrator, nor any person executing the bonds shall be liable personally on the bonds.

(g) The Authority is authorized to purchase any outstanding bonds issued or assumed by it with any funds available therefor, at a price not more than the principal amount or the current redemption price thereof and the accrued interest.

§ 343. Right to receivership upon default

(a) In the event that the Authority shall default in the payment of the principal of, or interest on, any of its bonds after the same shall become due, whether it be a default in the payment of principal and interest or in the payment of interest only at maturity or upon call for redemption, and such default shall con-

tinue for a period of thirty (30) days, or in the event that the Authority or the officers, agents, or employees thereof shall default in any agreement made with the holders of the bonds, any holder or holders of the bonds (subject to any contractual limitation as to a specific percentage of such holders), or trustee therefor, shall have the right to apply in an appropriate judicial proceeding to any court of competent jurisdiction in Puerto Rico for the appointment of a receiver of the undertakings, or parts thereof, the income or revenues of which are pledged to the payment of the bonds so in default, whether or not all the bonds have been declared due and payable and whether or not such holder, or trustee therefor, is seeking or has sought to enforce any other right or to exercise any remedy in connection with such bonds. Upon such application the court may appoint, and if the application is made by the holders of twenty-five percent (25%) in principal amount of such bonds then outstanding, or by any trustee for holders of bonds in such principal amount, shall appoint, a receiver of such undertakings.

(b) The receiver so appointed shall forthwith, directly or by his agents and attorneys, enter into and upon and take possession of such undertakings and each and every part thereof, and may exclude the Authority, its officers, agents, and employees and all persons claiming under them, wholly therefrom and shall have, hold, use, operate, manage, and control the same and each and every part thereof, and, in the name of the Authority or otherwise, as the receiver may deem best, shall exercise all the rights and powers of the Authority with respect to such undertakings as the Authority itself might do. Such receiver shall maintain, restore, insure, and keep insured, such undertakings and from time to time shall make

all such necessary or proper repairs as such receiver may deem expedient, shall establish, levy, maintain, and collect such rates, fees, rentals, and other charges in connection with such undertakings as such receiver may deem necessary, proper and reasonable, and shall collect and receive all income and revenues and deposit the same in a separate account and apply the income and revenues so collected and received in such manners as the court shall direct.

(c) Whenever all that is due upon the bonds, and interest thereon, and upon any other notes, bonds, or other obligations, and interest thereon, having a charge, lien, or encumbrance on the revenues of such undertakings and under any of the terms of any covenants or agreements with bondholders shall have been paid or deposited as provided therein, and all defaults in consequence of which a receiver may be appointed shall have been cured and made good, the court may, in its discretion and after such notice and public hearing as it deems advisable and proper, direct the receiver to surrender possession of such undertakings to the Authority, the same right of the holders of the bonds to obtain the appointment of a receiver to exist upon any subsequent default as hereinabove provided.

(d) Such receiver shall act, in the performance of the powers hereinabove conferred upon him, under the direction and supervision of the court and shall at all times be subject to the orders and decrees of the court and may be removed thereby. Nothing herein contained shall limit or restrict the jurisdiction of the court to enter such other and further orders and decrees as such court may deem necessary or appropriate for the exercise by the receiver of any functions specifically set forth in sections 331-352 of this title.

(e) Notwithstanding anything in this section to the contrary, such receiver shall have no power to sell, assign, mortgage, or otherwise dispose of any assets of whatever kind or character belonging to the Authority and useful for such undertakings, but the powers of any such receiver shall be limited to the operation and maintenance of such undertakings, and the collection and application of the income and revenues therefrom, and the court shall not have jurisdiction to enter any order or decree requiring or permitting said receiver to sell, mortgage, or otherwise dispose of any such assets.

§ 344. Remedies of bondholders

(a) Subject to any contractual limitations binding upon the holders of any issue of bonds, or trustees therefor, including but not limited to the restriction of the exercise of any remedy to a specified proportion or percentage of such holders, any holder of bonds, or trustee therefor, shall have the right and power, for the equal benefit and protection of all holders of bonds similarly situated--

(1) By mandamus or other suit, action or process of law or equity to enforce their rights against the Authority and the Board, their officers, agents and employees to perform and carry out their duties and obligations under sections 331-352 of this title, as well as their agreements and contracts with the bondholders;

(2) By action or suit in equity, require that the Board and the Authority assume responsibility as if they were the trustees of an express trust;

(3) by action or suit in equity to enjoin any acts or things which may be unlawful or in violation of the rights of the bondholders; and

(4) to bring suit upon the bonds.

(b) No remedy conferred by sections 331-352 of this title upon any holder of the bonds, or any trustee therefor, is intended to be exclusive of any other remedy, but each such remedy is cumulative and in addition to every other remedy, and may be exercised without exhausting and without regard to any other remedy conferred by sections 331-352 of this title or by any other law. No waiver of any default or breach of duty or contract, whether by any holder of the bonds, or any trustee therefor, shall extend to or shall affect any subsequent default or breach of duty or contract or shall impair any rights or remedies thereon. No delay or omission of any bondholder or any trustee therefor to exercise any right or power accruing upon default shall impair any such right or power or shall be construed to be a waiver of any such default or acquiescence therein. Every substantive right and every remedy, conferred upon the holders of the bonds, may be enforced or exercised from time to time and as often as may be deemed expedient. In case any suit, action, or proceeding to enforce any right or exercise any remedy shall be brought or taken and then discontinued or abandoned, or shall be determined adversely to the holder of the bonds, or any trustee therefor, then and in every such case the Authority and such holder, or such trustee, shall be restored to their former positions and rights and remedies as if no such suit, action, or proceeding had been brought or taken.

§ 345. Reports

The Authority shall submit to the Legislature and to the Governor of Puerto Rico, as soon as practicable after the close of each fiscal year of the Commonwealth Government but prior to the end of the calen-

dar year: (1) a financial statement and complete report of the business of the Authority for the preceding fiscal year, and (2) a complete report on the status and progress of all its undertakings and activities since the creation of the Authority or the date of its last such report. The Authority shall also submit to the Legislature and to the Governor of Puerto Rico, at such other times as may be required, official reports of its business and activities under sections 331-352 of this title.

§ 346. Commonwealth and political subdivisions not liable on bonds

The bonds and other obligations issued by the Authority shall not be a debt of the Commonwealth of Puerto Rico or any of its municipalities or other political subdivisions, and neither the Commonwealth of Puerto Rico nor any such municipalities or other political subdivisions shall be liable thereon, nor shall such bonds or other obligations be payable out of any funds other than those of the Authority.

§ 347. Bonds legal investments and security for deposits

The bonds of the Authority shall be lawful investment, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the Government of Puerto Rico or any officer or officers thereof.

§ 348. Tax exemptions

(a) It is hereby found and declared that the purposes for which the Authority is created and shall exercise its powers are the promotion of the general welfare, and the increase of commerce and prosper-

ity, and all are public purposes for the benefit of the people of Puerto Rico, and that therefore the Authority shall not be required to pay taxes, excises or assessments on any of the property acquired by it or under its jurisdiction, control, possession, or supervision, or on its activities in the operation and maintenance of any undertaking, or on the revenues derived from any of its undertakings and activities.

(b) The Authority shall also be exempt from the payment of all kinds of fees, taxes, or imposts heretofore or hereafter required by law for the prosecution of judicial proceedings, the issuing of certifications in all offices and dependencies of the Commonwealth of Puerto Rico, and the execution of public documents and their registration in any public registry of Puerto Rico.

(c) In order to facilitate the procurement of funds by the Authority to enable it to carry out its corporate purposes, the bonds issued by the Authority and the income therefrom shall be and remain at all times exempt from the payment of income tax.

§ 349. Declaration of public utility

For the purposes of section 336(h) and section 339 of this title, all works, projects, and property and their accessories, which the Authority may deem necessary and convenient to use in carrying out the purposes expressed in sections 331-352 of this title are hereby declared of public utility.

§ 350. Agreement of the commonwealth government

The Commonwealth Government does hereby pledge to, and agree with, any person, firm or corporation, or any federal, Commonwealth or State agency, sub-

scribing to or acquiring bonds of the Authority to finance in whole or in part any undertaking or any part thereof, that it will limit or restrict the rights or powers hereby vested in the Authority until all such bonds at any time issued, together with the interest thereon, are fully met and discharged. The Commonwealth Government does further pledge to, and agree with, any federal agency that in the event that any federal agency shall construct, extend, improve, or enlarge, or contribute any funds for the construction, extension, improvement, or enlargement of, any project of the Authority or any portion thereof, the Commonwealth Government will not alter or limit the rights or powers of the Authority in any manner which should be inconsistent with the continued maintenance and operation of the said project or the extension, improvement, or enlargement thereof, or which would be inconsistent with the due performance of any agreements between the Authority and any such federal agency; and the Authority shall continue to have and may exercise all rights and powers herein granted so long as the same shall be necessary or desirable for the carrying out of the purposes of sections 331-352 of this title and the purpose of any federal agency in constructing, extending, improving or enlarging, or contributing funds for the construction, extension, improvement or enlargement of said project or any portion thereof.

§ 351. Injunctions

An injunction shall not be granted to prevent the application of sections 331-352 of this title or any part thereof.

§ 352. Inconsistent provisions superseded

Insofar as the provisions of sections 331-352 of this title are inconsistent with the provisions of any other Act of the Legislature of Puerto Rico, the provisions of sections 331-352 of this title shall be controlling and no law heretofore or hereafter passed governing the administration of the Commonwealth Government or any parts, offices, bureaus, departments, commissions, dependencies, municipalities, branches, agents, officers, or employees thereof shall be construed to apply to the Authority unless so specifically provided, but the affairs and business of the Authority shall be administered as provided herein.

§ 353. Repealed. Act June 14, 1961, No. 60, p. 116, § 2, eff. July 1, 1961.

§ 354. Transmitting of funds to commonwealth treasury

On or before August 31 of each year the Puerto Rico Ports Authority shall pay into the Commonwealth Treasury the sum of four hundred thousand dollars ($400,000) from the remainder of the income of said Authority corresponding to the preceding fiscal year, after meeting for the said fiscal year the operating and maintenance expenses of the Authority, the principal of and interest on its outstanding obligations and the reserves established by the Authority for such purposes (the remainder of which income shall be hereinafter known as "net income"). If in any fiscal year the net income is not sufficient to pay in full into the Commonwealth Treasury the sum herein fixed, the Authority shall be bound to pay only so far as the said net income may go, and in such case, the obligation of the Authority to make said payment in excess of its net income shall be cancelled and shall

not constitute a future charge against the receipts of the Authority.

§§ 355-357. Repealed. Act June 22, 1975, No. 74, p. 181, § 5, eff. June 22, 1975.

APPENDIX D

LAWS OF PUERTO RICO
ANNOTATED
2006 Ed.

Chapter 101 Dock and Harbor Act of Puerto Rico of 1968

Subchapter I. General Provisions

§ 2101. Short title

This chapter shall be known and may be cited as the Dock and Harbor Act of Puerto Rico of 1968.

§ 2102. Reference to other laws

When in this chapter reference is made to another law, the reference shall include all amendments made to the law and those which subsequently may be made.

§ 2103. Definitions

The following terms shall have for the purposes of the application of this chapter, the significance hereinafter indicated, unless otherwise clearly indicated by the context of this chapter, and the use of the term in the singular shall include the plural and vice versa:

(a) *Puerto Rico.* Shall mean the Island of Puerto Rico and the adjacent islands and waters within the jurisdiction of the Commonwealth of Puerto Rico.

(b) *Authority.* Means the Puerto Rico Ports Authority created by §§ 331-352 of this title, except that in all matters concerning the Port of the Americas, the word "Authority" shall mean the Port of the Americas Authority.

(c) *Director.* Shall mean the Executive Director of the Authority.

(d) *Administrator.* Means the Executive Director of the Ports Authority, as set forth in the provisions of §§ 331 et seq. of this title, except that in all matters concerning the Port of the Americas, the word "Administrator" shall mean the Executive Director of the Port of the Americas Authority.

(e) *Vessel or Boat.* Shall mean any vehicle used for *the* transportation of persons or things on the water.

(f) *Bigger boat.* Shall mean all kinds of vessels and boats engaged in the transportation of freight and passengers between any ports.

(g) *Smaller boat.* Shall mean any vessel not a bigger *boat.*

(h) *Navigable waters of Puerto Rico.* Shall mean the *navigable* waters under the control or dominion of Puerto Rico.

(i) *Harbor.* Shall mean every part of the coast where a vessel may anchor, be moored to another vessel or to a dock, or has fastened itself to land; and the term notwithstanding any condition, shall mean any harbor of Puerto Rico.

(j) *Dock.* Shall mean any work used for the mooring of vessels to the land or for the loading or unloading of persons or things; but the term shall not include docks under the immediate control of the United States.

(k) *Trade.* Shall mean the transportation of passengers or merchandise by means of a vessel.

(*l*) *Marine trade.* Shall mean the trade up to, from or within any harbor of Puerto Rico, or in its navigable waters; but the term does not include, for the purposes of §§ 2201 and 2301 of this title, acts, contracts or commercial transactions other than those referred to in §§ 2401--2418 and 2501-2517 of this title.

(*m*)*Coastwise trade.* Shall mean the trade between ports of Puerto Rico or between the latter and ports within the coastwise trade of the United States.

(*n*) *Terrestrial maritime zone.* Shall mean the space of the coasts of Puerto Rico touched by the sea during its ebb and flow, where tides are noticeable, and where the largest waves during a storm are felt in places where tides are not noticed, and it includes the lands recovered from the sea and the river borders up to the place where they are navigable or where the tides are noticed; and the term, notwithstanding any condition, shall mean the terrestrial maritime zone of Puerto Rico.

(*o*) *Port zone.* Shall mean that part of the terrestrial maritime zone and other adjacent lands to a port delimeted as harbor zone of the particular harbor in question as provided in this chapter.

(*p*) *Person.* Shall mean any natural or artificial person, or any association, partnership, organization, firm or enterprise; and it includes every head, director, supervisor, officer, manager, official, promoter, administrator, agent, representative or consignee of any person.

(q) *Ship owner.* Shall mean not only the owner of the vessel but the person who in any manner has chartered or rented the vessel.

(r) *Ship captain.* Shall mean the person having direct command of the ship and of its crew.

(s) *Agent.* Shall mean, in connection with a ship, its consignee or the person who in any other manner represents in Puerto Rico the owner of the ship or its captain; and in connection with its cargo, its consignee or the person that in any manner represents in Puerto Rico the owner of the ship's cargo.

(t) *Port pilot.* Shall mean the person with a license from the Authority to act as such in the port or ports designated in the license, and it includes those who are authorized to act as pilots under Act No. 59 of April 30, 1928; and the term "pilot", notwithstanding any condition, shall mean "port pilot" as herein defined.

(u) *Pilot service.* Shall mean the service rendered to a ship by a port pilot helping the ship to enter and leave the port and to anchor, moor and move it in the harbor or from one dock to another.

(v) *Tariff, rent or anchorage fee.* Shall mean the charge imposed on a ship and collected from its owner or captain or from the agent of any of these two, for mooring the ship to a dock or to any other part of the harbor zone in which it is carrying out its loading and unloading operations by using a dock, or by anchoring it to another ship so anchored.

(w)Tariff, rent or wharfage fee. Shall mean the charge imposed on the cargo of a ship to be collected from the owner of the cargo or from his agent for loading or unloading it by making use of a dock.

(x) Tariff, rent or delay fee. Shall mean the charge imposed on the cargo or merchandise and collected from its owner or from his agent for retaining it in a dock or in any other part of the harbor zone in excess of the exemption period established for such purpose.

(y) Navigable waters of the Port of the Americas. Shall mean the navigable waters of Puerto Rico adjacent to the Port of the Americas whose control by the Authority is necessary or convenient for the efficient operation of the Port of the Americas. The Board of Directors of the Port of the Americas Authority, upon consultation with the Ports Authority, shall determine the scope of the geographic area that will comprise the navigable waters of the Port of the Americas.

(z) Contracted entity. Shall mean the private or public natural person or legal entity, or consortium thereof, selected by the Authority to develop, operate, or maintain the Port of the Americas.

(aa)Port of the Americas. Shall mean the navigable waters of the Port of the Americas and its port zone, maritime land zone, lands submerged under port waters, and adjacent lands included in the geographic area within which the activities of the transshipment port located in the southern region of Puerto Rico are con-

ducted, including piers, berths, wharves, jetties, breakwaters, dikes, docks, railroad connections, sidings, or other buildings, structures, facilities, or improvements used for navigation, the accommodation of ships and their cargo, the storage of cargo and containers, the handling of cargo and containers, the transfer activities, and any other activity incidental to the foregoing. The Board of Directors of the Port of the Americas Authority shall determine the scope of the geographic area that will comprise the Port of the Americas.

§ 2104. Application

This chapter is applicable to the navigable waters of Puerto Rico, to its harbor zones and to its ports and docks, either public or private (unless otherwise clearly indicated by the context), up to the limit extended by the legislative authority of Puerto Rico, but not excluding in accordance with the provisions of §§ 7, 8, and 9 of the Puerto Rican Federal Relations Act, the application of the laws and statutes of the United States which are locally applicable in accordance with the provisions of this chapter.

§ 2105. Administration

The Authority shall be in charge of the execution and administration of this chapter, and all sums collected under its provisions shall be covered into the funds of the Authority, except that in all matters concerning the Port of the Americas, the Port of the Americas Authority shall be in charge of the execution and administration of this chapter and shall receive the sums collected in connection with the administration of the Port of the Americas.

§ 2106. Exercise of powers

The Authority, the Administrator, and the Director shall exercise, pursuant to the provisions of §§ 331-352 of this title, all powers and functions hereby conferred on the Authority, except that in all matters concerning the Port of the Americas, the Port of the Americas Authority and its Executive Director shall be in charge of exercising the powers and functions hereby conferred on the Port of the Americas Authority.

§ 2107. Delegation of powers

The Administrator and the Director may delegate and assign to officers and employees of the Authority the powers and functions conferred hereby to each and to the Authority, respectively, except when this chapter expressly provides otherwise. In the case of the Port of the Americas, notwithstanding which sections of this chapter expressly provide otherwise, the Board of Directors of the Port of the Americas Authority may delegate and assign the faculties conferred thereto by this chapter to other government entities of the Commonwealth of Puerto Rico or to officers and employees of the Port of the Americas Authority or of other government entities of the Commonwealth of Puerto Rico, and the Board of Directors of the Port of the Americas Authority may delegate to the contracted entity the powers described in §§ 2201, 2201, 2501, 2505, and 2602 of this title.

§ 2108. Continuance of powers

The officers and employees of the Authority and the persons who on the date of effectiveness of this act are discharging functions under the provisions of Act No. 59 of April 30, 1928, and its regulations shall continue discharging them in the same manner until

otherwise provided by the Authority in accordance with the provisions of this chapter.

§ 2109. Rules and regulations

The Administrator may approve rules and regulations in accordance with the provisions of this chapter to expedite its execution in a fair, efficient and economic manner and in order to protect and promote navigation, commerce, prosperity and general welfare. The rules and regulations that the Administrator may approve to such purposes shall have force of law once they have been promulgated in accordance with this chapter. The Administrator shall not delegate the powers herein conferred, but may establish consultant proceedings, including or not the holding of public hearings of quasi-legislative character before the person designated for such purpose, to hear the persons interested in the said regulation. This designation shall be made by the Administrator or by the Director through delegation of the Administrator.

§ 2110. Laws and regulations in force

(a) Act No. 59 of April 30, 1928, shall continue in force, as provided in this section, as said act was modified by the Reorganization Plan No. 10 of 1950, except as hereinafter provided in subsection (d).

(b) Except as hereinafter provided in subsection (d) and with the exception of the provisions in conflict herewith and the penal clauses for the same offenses herein defined and punished, the following sections of Act No. 59 of April 30, 1928, shall continue transitorily in force until the rules or regulations that the Administrator may approve on the same matter become effective as provided in this chapter: § 2 to § 22, both inclusive, § 24, § 25, § 30, § 31, § 35 to § 37A, both inclusive, § 43 and § 45 to § 51, both inclusive.

Those provisions shall be known and may be cited while in force as the Regulation of the Docks and Harbors of Puerto Rico of 1928. Notwithstanding, the Administrator is hereby empowered to adopt and promulgate said provisions totally or partially and with or without amendments, in accordance with the provisions of § 2109 of this title. If so promulgated by the Administrator, said provisions shall govern with force of law as promulgated until amended or repealed by the Administrator.

(c) The provisions of the regulations approved under Act No. 59 of April 30, 1928, not in conflict herewith, shall continue in force until amended or repealed by the Administrator as provided in § 2109 of this title.

(d) With the exception of the provision of this chapter as to all parts of the terrestrial maritime zone included in the harbor zone, the Secretary of Transportation and Public Works (formerly the Commissioner of the Interior) shall have over the terrestrial maritime zone and over the lands added to it or reclaimed from the sea the same powers and functions of vigilance, maintenance and granting of permits which were conferred to be exercised directly or through the port captains by §§ 18 and 47 of Act No. 59 of April 30, 1928, notwithstanding as otherwise provided by the Reorganization Plan No. 10 of 1950; and shall retain, with the same exception, the powers and functions as conferred by Act No. 22 of April 13, 1916, for the permission of extracting sand, gravel and stone from the maritime zone and from the beds of unnavigable streams, and by §§ 18 and 19 of Title 28, to make grants for the development and utilization of particular sections of beaches. §§ 18, 47, 49 and 51 of Act No. 59 of April 30, 1928, shall continue

in force as herein provided, in everything relative to the said functions and powers of the Secretary of Transportation and Public Works; and said provisions, with regard to said functions and powers, shall not form a part of the Regulation of Docks and Harbors of Puerto Rico of 1928, as provided in subsection (b) of this section.

(e) Nothing herein provided shall be construed in detriment of the powers vested in the Public Service Commission of Puerto Rico by §§ 1001-1281 of Title 27.

§ 2111. Pending proceedings and acquired rights

This chapter shall not affect the acquired rights or obligations contracted by the Authority or by any person under previous legislation which shall be applicable to pending actions and proceedings and to actions arising therefrom although initiated after the effective date of this act. But this act shall be applicable to all actions and proceedings arising after its effectiveness, either under its provisions or under the provisions of the Regulation of the Docks and Harbors of Puerto Rico of 1928.

§ 2112. Actions against insurers

The insured party in any suit for damages arising under the provisions of this chapter against an insured person may sue the insurer separately or jointly with the insured person. The action against the insurer shall be subject to the responsibility limits and to the conditions of the insurance contract including any condition which makes the insurer responsible irrespective of the legal responsibility of the insured person. The insurer may raise against the

injured party the defenses which the insurer may have against the insured person.

§ 2113. Service of summons

It shall be incontrovertibly understood that the owner, captain or insurer of every vessel sailing in Puerto Rican waters, or entering one of its harbors, or which uses one of its docks, has given his consent to be served in any suit begun under the provisions of this chapter in which he is defendant, if not within Puerto Rico, through a substitute service through the Secretary of State of Puerto Rico or of the person appointed by him for such purpose, in accordance with Rule 4.7 of the Rules of Civil Procedure for the General Court of Justice of Puerto Rico, as amended by Act No. 105 of June 28, 1965. This section shall likewise apply to the insurer and to the agent of the owner of the vessel, to the insurer and to the agent of the ship's captain, to the insurer of the owner's agent or of the ship's captain and to the owner of the ship's cargo, or his agent and to the insurer of both or of the cargo.

Subchapter II. General Powers of the Authority

§ 2201. General powers

The Authority shall have control of the navigation and the marine trade in navigable waters of Puerto Rico and in its harbors and docks, as provided in this chapter, except in the navigable waters and the harbors and docks of the Port of the Americas, where the Port of the Americas Authority or the contracted entity, through delegation by the latter, shall have the control thereof.

§ 2202. Waters, ports, docks and harbor zones

There are hereby placed under the control and administration of the Authority, to be administered in benefit of the People of Puerto Rico in the interest of navigation and commerce, the harbors and their waters, the navigable waters in and around Puerto Rico, the public property docks, the lands submerged under the harbors and under every dock and such waters, the terrestrial maritime zone comprised within every port zone and the latter, and all buildings and structures built therein which are the property or which are under the dominion of Puerto Rico, except docks, buildings or structures property of any of its municipalities; the public lands and buildings reserved by the United States for public purposes; and the navigable waters, the port, the docks, the lands submerged under the port, and the lands and buildings of the Port of the Americas, which will be under the control and administration of the Port of the Americas Authority.

§ 2203. Administrative fines and action for collection

The Administrator may include in the rules or regulations, approved in accordance with this chapter, provisions for imposing and payment of reasonable administrative fines, which shall not be less than twenty-five (25) or more than five hundred dollars ($500), for violations to the rules or regulations; and may, within these same limitations, provide by rules or regulations for imposing and payment of such fines for violations to this chapter or to the Regulation of Docks and Harbors of Puerto Rico of 1928. If the fine has not been paid within thirty (30) days of the written notice of its imposition, the Authority may begin a civil action before the Court of

First Instance for the collection of the fine and for a sum equal to its amount for indemnity which the court may, in its discretion, include in the judgment *in the measure deemed fair, plus the proceeding costs* and a reasonable sum for attorney's fees. The defendant may raise before the court all defenses it may have against the imposition of the fine. The payment of the fine within the said term of thirty (30) days shall constitute an impediment to any criminal action under the provisions of this chapter for the same violation which caused the imposition of the fine.

§ 2204. Injunction proceedings

The Authority may begin injunction proceedings before the Court of First Instance to enforce the provisions of this chapter and the provisions of the rules or regulations approved and promulgated by the Administrator or which continue in force as therein provided, it being sufficient that the preliminary or permanent injunction be issued demonstrating that the remedy is necessary in order to avoid the violation of any of said provisions.

§ 2205. Powers of investigation

(a) In order to comply with the provisions of this chapter and in the exercise of the powers and functions respectively vested therein and of those likewise vested on the Authority, the Administrator and the Director may carry out the investigations which they may deem necessary; and with this purpose they may administer oaths, receive testimonials, hold hearings and issue subpoenas requiring the appearance of witnesses and the presentation of documental evidence or of any other kind.

(b) The Administrator and the Director may delegate said powers of investigation, including the issu-

ance of subpoenas for the appearance of witnesses and presentation of evidence, to officers and employees of the Authority or to any other person designated to carry out the investigation, hearing or proceeding. The Administrator may determine through rules or regulations adopted as provided in § 2109 of this title the procedures in connection with such investigations, hearings and subpoenas, as well as to the delegation of the powers herein vested on the Director and on the Administrator.

(c) If a subpoena issued under the provisions of this section or of the regulation approved to such effect by the Administrator were not duly complied with, the Authority may appear before the Court of First Instance so that it will order the compliance with the subpoena. The court shall be empowered to issue orders, making compulsory the fulfillment of the subpoena and to punish for contempt disobedience to the orders issued to such effect.

(d) No natural person shall refuse to comply with a subpoena issued under the provisions of this section, or of one of said orders of the Court of First Instance, alleging that the testimony or evidence required may incriminate him or subject him to a penalty, but he may not be criminally prosecuted in connection with any transaction or matter on which he has given testimony or produced documental evidence or of any other kind, except that he may be prosecuted and condemned for perjury committed on rendering testimony.

Subchapter III. Navigation and Marine Trade

§ 2301. Powers of regulations

The Administrator shall approve rules and regulations to regulate navigation and marine trade, includ-

ing the inspection of ships to determine their condition of cleanliness and safety for navigation, in accordance with the powers vested on the Authority in § 2201 of this title and as provided in § 2109 of this title.

§ 2302. Offense for violation

Every person who illegally obstructs navigation or marine trade in navigable waters of Puerto Rico, or in its harbors or docks, or who violates any of the provisions or the rules or regulations approved and promulgated by the Administrator to regulate navigation or marine trade in said waters, docks or harbors, shall incur, for each violation, in a misdemeanor, punishable as provided in § 2801 of this title. In those cases the only defense which shall be permitted is that the violation was due to an inevitable act or omission in spite of the proper care used to avoid such happenings.

§ 2303. Damages

(a) With the exception of that specially provided for by Act No. 45 of April 18, 1935 (Workmen's Accident Compensation Act), §§ 1--42 of Title 11, and that provided in § 2304 of this title, the provisions of §§ 5141 and 5142 of Title 31, shall be applicable to damage caused in navigable waters of Puerto Rico or in its harbors or docks; but the proof that the damage was exclusively caused by the defendant or by the latter jointly with a person for which the plaintiff must not respond, on illegally obstructing the navigation or marine trade in navigable waters of Puerto Rico, or in its harbors or docks, or on infringing any of the provisions of this chapter or of the rules or regulations approved and promulgated by the Administrator to regulate navigation or marine trade in said waters,

docks or harbors, or the provisions of the Regulation of Docks and Harbors of Puerto Rico of 1928, on the same matter shall establish against the defendant a controversial presumption of fault or negligence. The responsibility herein provided shall be solidarily demandable, when the damage has been caused by a ship, to the person owner of same, to its captain and to the agent of any of them.

(b) The damages caused through the action or omission of the Administrator or of any officer, employee or agent of the Authority, while acting in his official capacity and within the scope of his function, employment or commitment as an agent of the Government of the Commonwealth of Puerto Rico under the provisions of this chapter (in contraposition as when acting in the exercise of the property rights of the Authority as a public corporation) intervening fault or negligence, shall exclusively be requirable to the Commonwealth of Puerto Rico as provided by law.

§ 2304. Collision damages

If the damages are caused by collision, the following rules shall be observed to fix the civil responsibility established in § 2303 of this title:

(a) If only one of the parties incurred in a fault, it shall sustain its own damages and shall compensate the other party for all damages caused.

(b) If both parties incur in fault, the damages shall be equally divided among both, unless there is a great disparity among the faults. In this case, the damages shall be equitably distributed in proportion to the seriousness of the faults which caused the collision.

(c) Should it be impossible to determine which party was at fault, the damages shall be equally divided between both.

(d) If none of the parties were at fault, each one shall sustain its own damages.

§ 2305. Lien

The judicial claim for damage caused by a ship as provided in §§ 2303, 2304, 2504 and 2513 of this title shall constitute a lien on the ship. The action for the lien shall expire after the lapse of one (1) year from and after the date in which the injured party had knowledge of the damage. This lien shall have the same preference as determined by the laws and statutes of the United States on the same matter.

Subchapter IV. Pilot Service

§ 2401. Powers of the Authority

The pilot service in the harbors of Puerto Rico shall be under the control of the Authority.

§ 2402. Regulation

The Administrator shall approve rules and regulations to regulate the pilot service in the harbors of Puerto Rico in accordance with the powers vested in the Authority by sections 2201 and 2401 of this title and as provided in § 2109 of this title.

§ 2403. Pilot license

No person shall offer pilot service in the harbors of Puerto Rico unless he has a pilot license issued by the Authority, who shall charge a fee of fifteen dollars ($15) for its original issuance and ten dollars ($10) for its renewal. The license shall specify the name of the person to whom it is issued, date of birth, date of issuance, date of expiration, register number, the port

or ports for which it was issued and any other information that the Administrator may by rule or regulation require. The license shall only be valid for the port or ports for which it was issued and shall expire after five (5) years of its issuance. The Authority shall keep and maintain a register of these licenses in which it shall enter said annotations.

§ 2404. Qualifications

The Authority may only issue pilot licenses to natural persons, citizens of the United States, of age, and of good repute who have the adequate knowledge for the sailing of any kind of vessel, of the rules and regulations in force or approved and promulgated by the Administrator under sections 2301 and 2402 of this title, and of the tides, anchorages and peculiarities of the port or ports for which license has been issued. No license shall be valid unless signed by the Director.

§ 2405. Bond

The Authority shall not issue or renew any pilot license until the person who requests such license renders a bond to the satisfaction of the Director for a reasonable sum as determined by the Administrator through rule or regulation, to answer for the faithful compliance of his duties as pilot.

§ 2406. Examination, renewal and expiration of licenses

The Authority shall submit every pilot license applicant to a careful examination on his qualifications and no license shall be issued unless he meets the qualifications indicated in § 2404 of this title. No license shall be renewed to any person over sixty-five (65) years of age unless the applicant shows to the

satisfaction of the Director that he is mentally and physically capable of carrying out the functions of a pilot without endangering himself or the marine trade and persons working therein. Every license shall automatically expire on the date in which the pilot reaches seventy (70) years of age. The persons who on the date of effectiveness of this act have a pilot license under Act No. 59 of April 30, 1928, may practice as pilots for the term of one (1) year from and after said date without submitting to an examination, provided they render the bond required under § 2405 of this title and who still have not reached the age of sixty-nine (69) years. These licenses and those which subsequently may be issued shall be renewed at their expiration for the term of five (5) years unless the person who has the license does not qualify because of his age to have same renewed or that the Director refuses the renewal for just cause. The Director shall not delegate the powers and functions herein conferred.

§ 2407. Suspension, revocation and unrenewable licenses

The Director may, through just cause, suspend for a determined term or permanently revoke any license before its expiration. Not only in cases of suspension and revocation but as well as in cases where the renewal of a license is denied, the Director shall notify his decision in writing to the interested person specifying the cause or causes of the decision taken. The affected person may, within the unextendible term of twenty (20) days from and after the date in which he has been notified of the decision of the Director, request its reconsideration. Within the twenty (20) days following the date in which he receives the reconsideration motion of the affected person, the Di-

rector shall accept it or appoint the case to be heard in a public hearing before the person designated by him for such purpose. Adequate written notification shall be given by the Director to the affected person of such appointed day with at least ten (10) days in advance of the date thereof. A complete record shall be made of all incidents and of the proof received in the hearing. On its conclusion, the person presiding same shall certify the transcription of the record and shall submit same together with his findings of fact and issues of law and his recommendations to the Director, notifying the affected person with a copy of the conclusions and recommendations. Within the ten (10) days following the date in which this notification is made, or within the extension granted by the Director for such purpose, the affected person may submit to the latter written objections to said conclusions and recommendations. The Director shall finally resolve the case making his own findings of fact and issues of law, for which he may adopt or modify those formulated by the person who presided the hearing. If the final decision of the Director should be adverse, the affected person may, within the unextendible term of twenty (20) days from and after the date in which he was notified in writing of such resolution, appeal, presenting a petition to such effect before the Part of the Court of First Instance in which is located any of the harbors for which the license was issued and notifying the Director with a copy of the petition. The Director shall briefly remit to the Secretary's Office of the court the original or certified copy of the record of the case from and after its original decision. The subsequent proceedings before the Court of First Instance shall be governed, in everything herein applicable, by Rules 7 through 9 of the Rules for Appeals from the District Court to the

Court of First Instance, App. III-A of Title 4. Neither the petition for reconsideration from the decision of the Director nor the petition for appeal before the Court of First Instance shall have the effect of suspending the decision of the Director. The Court of First Instance shall revise the decision of the Director on the basis of the record of the administrative hearing and may only revoke the decision of the Director if the proof arising from the record establishes that he acted arbitrarily. The Director shall not delegate the powers and functions herein conferred, except as herein provided.

§ 2408. Offense for rendering pilot service without license

Any person who illegally renders, attempts or offers to render any pilot service in harbors or navigable waters of Puerto Rico shall incur, for each violation, in a misdemeanor punishable as provided in § 2801 of this title.

§ 2409. Penalties for noncompliance of duties

The Authority shall impose and collect, for each violation, an administrative fine of not less than twenty-five dollars ($25) or greater than one hundred dollars ($100) from every pilot who incurs in negligence in the fulfillment of his duties or who voluntarily fails to comply with the same without just cause in violation of this chapter, of the Regulation of Docks and Harbors of 1928, or in violations approved and promulgated hereunder which continue in force, or of the rules or regulations approved and promulgated by the Administrator as provided in § 2402 of this title. The provisions of § 2203 of this title shall be applicable to the fines imposed by the Authority in accordance with the provisions in this section. The Di-

rector may also suspend, revoke or not renew the pilot license in accordance with § 2407 of this title.

§ 2410. Damage responsibilities

Any pilot who causes damages to another person or to the Authority violating § 2409 of this title shall incur in civil responsibility as provided in § 2303 of this title.

§ 2411. Lien on bond

The responsibility incurred by a pilot under §§ 2409 and 2410 of this title shall constitute a lien on his bond.

§ 2412. Ships subject to pilot service

No alien ship nor any ship of the United States navigating under registration may enter or leave a harbor without obtaining pilot service from a pilot licensed by the Authority for the said harbor.

§ 2413. Exemptions

The following ships shall be exempt from said pilot service:

(a) Every registered ship and with a license to engage in coast-wise trade, except when entering a harbor after having entered a foreign port or on leaving the harbor en route to a foreign port.

(b) Every ship the property or under control of the United States, Puerto Rico or foreign countries not engaged in marine trade.

(c) Every fishing boat with its own catch of fish to be unloaded in Puerto Rico, if piloted by a pilot licensed in the United States for said harbor, except when entering the harbor after having entered a for-

eign port or leaves the harbor en route to a foreign port.

(d) Every pleasure boat.

§ 2414. Pilot fees

Every ship subject to pilot service as provided in sections 2412 and 2413 of this title, and every ship which requests and obtains said service without being subject to same, shall pay the following fees to the pilot rendering the service (or to the pilot in his stead who offers to render said services in the event that the ship's captain refuses the service, the ship being subject to such services):

(a) Four (4) dollars for each foot or fraction of foot in excess of six (6) inches drawn by the ship in the deepest drawing on any of its two (2) sides in its route through the port in normal waters.

(b) Twenty-five (25) additional dollars if the ship has to be towed because it is unable to move under its own power.

(c) Half fee as indicated in subsections (a) and (b) for every movement, change or shifting of berth of the ship after it has cast anchor or has come alongside a port, except when the shifting of berth requires moving the ship from one side to another side of the same dock or from one dock to another not contiguous.

(d) Twice the fee indicated in subsections (a), (b) and (c) if the service is rendered after sunset and before sunrise.

(e) Half fee as indicated in subsections (a), (b) and (d), except as to subsection (c) if the ship enters port in need of aid, or with the only purpose of taking water, fuel or provisions in order to continue voyage.

(f) Twice the corresponding fee if the ship's captain refuses the service, the ship being subject to receive it.

The Puerto Rico Ports Authority shall revise and fix discretionally the pilot fees established in subsections (a), (b), (c), (d), (e) and (f), taking into consideration the tradition, use, custom and the variables that may affect such fees.

The Authority shall prepare a regulation to establish the rights and duties of the parties which are directly or indirectly related to maritime transportation and the pilot service to ships. This regulation shall be made within a term of not more than twelve (12) months on and from the date in which this legislative measure becomes a law.

§ 2415. Detention of pilot on board

A pilot unnecessarily detained on board a ship shall be entitled to receive twenty-five dollar ($25) for each hour or fraction of hour so detained; and if not permitted to land but taken to sea against his will, he shall be entitled to a compensation equal to the salary earned by the first officer of the ship, but which shall in no case be less than fifty dollars ($50) daily, from the date the ship leaves port until the day he is permitted to land, plus the return trip expenses.

§ 2416. Civil responsibility

The civil responsibility resulting from §§ 2414 and 2415 of this title shall be solidarily requirable of the person owner of the said ship, its captain and of the agent of any of them.

§ 2417. Lien

The judicial claim for the fees established in § 2414 of this title, or for the fees, compensation and ex-

penses provided in § 2415 of this title, prosecuted within the terms provided in § 2305 of this title, shall constitute a lien on said ship with the preference provided in said § 2305 of this title.

§ 2418. Offense for not using pilot

Every ship's captain subject to pilot service as provided in this chapter, who brings in or takes out a ship from a port, or who moves, changes or shifts berth after it has been anchored or has come alongside in the port, without using a pilot therefor and without a written permission from the Authority for not using a pilot for such specific purpose, shall incur, for each violation, in a misdemeanor punishable by imprisonment for a maximum term of two (2) years or by a maximum fine of ten thousand dollars ($10,000) or by both penalties.

Subchapter V. Harbors and Docks

§ 2501. Powers of the Authority

The Authority shall control the movement of ships, passengers and cargo in the ports and docks and in the harbor zones.

§ 2502. Regulation

The Administrator shall approve rules and regulations to govern the movements of ships in, to and from ports and docks, the loading and unloading of passengers and cargo, and the movement and storing of cargo in the docks and in harbor zones, in accordance with the powers vested on the Authority by §§ 2201 and 2501 of this title and as provided by § 2109 of this title.

§ 2503. Violation offense

Every person who violates any provisions of the rules or regulations approved and promulgated by

the Administrator as provided in § 2502 of this title shall incur, for each violation, in a misdemeanor punishable as provided in section 2801 of this title. In these cases the only defense shall be that as provided in § 2302 of this title.

§ 2504. Damages

Every person causing damages to another person or to the Authority on violating any of the provisions of the rules or regulations approved and promulgated by the Administrator as provided in § 2502 of this title shall incur in civil responsibility in accordance with the provisions of sections 2303 and 2304 of this title.

§ 2505. Tariffs, fees, rents and other charges for facilities of the Authority

The Authority shall charge for the use of its harbor facilities, and for the services or goods it may sell, loan or supply in connection with the use of said facilities, the tariffs, fees, rents and other reasonable and fair charges established by the Administrator, as provided in section 336(*l*) of this title. Without it being construed as a limitation to the powers herein conferred, the Administrator may fix in accordance with the provisions provided in this section, tariffs, fees, rents and other charges for bringing alongside, wharfage, delay and storing.

§ 2506. Tariffs, fees, rents and other charges for services of the Authority

The Authority shall also charge every ship entering a port the tariffs, fees, rents or reasonable and fair charges established by the Administrator as provided in § 2109 of this title for general harbor services rendered by the Authority under this chapter and its

regulations for the vigilance, supervision and safety of the harbor and of the vessels within the harbor.

§ 2507. Exemptions

(a) Any ship, the property or under the control of the governments of the United States, Puerto Rico or foreign countries not engaged in marine trade shall be exempt from the payment of tariffs, fees, rents or other charges established under § 2506 of this title and from those established for bringing a ship alongside under § 2505 of this title.

(b) The following ships shall also be exempt from the payment of tariffs, fees, rents or other charges established under § 2506 of this title:

(1) Every ship exclusively engaged in marine trade between Puerto Rican ports.

(2) Every minor vessel exclusively engaged in trade in a same port.

(3) Every ship bringing its own catch of fish to be unloaded in Puerto Rico.

(4) Every tourist ship known as cruise ships.

(5) Every ship entering port exclusively for taking the necessary water, provisions or fuel in order to continue its voyage.

(6) Every ship entering port exclusively for making indispensable repairs in order to continue its voyage.

(c) The Director may exempt the payment of tariffs, fees, rents or other charges established under §§ 2505 and 2506 of this title to every ship entering port with the purpose of loading or unloading persons or things in aid of persons injured by disasters which have occurred in Puerto Rico or in any other country,

as provided by the Administrator through rule or regulation approved and promulgated in accordance with the provisions in § 2109 of this title.

§ 2508. Civil responsibility and detention of ship

No ship subject to any payment in accordance with the provisions of §§ 2505, 2506 and 2507 of this title, or of any administrative fine under § 2203 of this title, may leave port without making the payment, for which the owner of the ship, its captain and the agent of any of them shall be jointly responsible. The Authority may detain the sailing of a ship until any sum owed under the provisions of this chapter has been paid.

§ 2509. Lien

The judicial claim for any unpaid sum by a ship under sections 2505 and 2506 of this title shall constitute a lien on the ship with the preference provided in § 2305 of this title. Action for this lien shall expire after the lapse of one (1) year from and after the date on which the debt has been settled and demandable.

§ 2510. Civil responsibility and lien for charges on merchandise

The owner of every merchandise and his agent shall be jointly responsible for the payment of every indebted sum on the merchandise under the provisions of this chapter. The judicial claim for the indebted sum on any merchandise unloaded in Puerto Rico and lifted from the dock shall constitute a lien on the merchandise with preference over any other except for taxes. Action for this lien shall expire after the lapse of six (6) months from and after the date in which the debt has been settled and demandable.

§ 2511. Annual license fee

(a) Every ship exclusively engaged in marine trade between ports of Puerto Rico and every minor vessel exclusively engaged in the traffic of passengers or of passengers and cargo in a same port shall pay in advance to the Authority for each fiscal year the reasonable and fair sum that the Administrator may establish as provided by § 2109 of this title instead of the tariffs, fees, rents and other charges referred to in § 2506 of this title.

(b) Every license issued by the Authority under § 2511 of this title shall state the corresponding correlative number, the name of the ship's owner and the name of the ship, its tonnage, the port or ports and the trade for which it is issued, the fees paid therefore and the maximum number of passengers and the maximum amount of cargo that the vessel may carry. The license shall always be kept on board the vessel to be shown when requested by the Authority. The Administrator may provide through rule or regulation approved as provided by § 2301 of this title, so that in one (1) or more visible places of the vessel there be exhibited the number of its license and the maximum of passengers and cargo which it may carry.

§ 2512. Detention of ship and lien

The Authority shall detain every ship or vessel which must pay and which has not paid the annual license fee referred to in § 2511 of this title, until payment has been made. Any sum due for such reason shall constitute a lien on the ship or minor vessel in the form provided in § 2305 of this title, but action on this lien shall expire after the lapse of one (1) year from and after the detention of the vessel.

§ 2513. Damages

Every person causing damage to another or to the Authority on engaging a vessel in trade, or on sailing it, in violation of § 2511 of this title, or of the license issued under said section, shall incur in a civil responsibility in accordance with the provisions in §§ 2303 and 2304 of this title.

§ 2514. Registration of vessels

Every ship and vessel referred to in § 2511(a) of this title shall be registered with the Authority, who shall issue a certificate to the owner of the vessel with the number and date of register upon previous payment of two (2) dollars.

§ 2515. Detention of vessel

The Authority shall detain every ship or vessel which must be registered and is not registered as provided in § 2514 of this title, until compliance with said section has been made by the owner of the vessel.

§ 2516. Offense for violations

Every person who voluntarily uses a vessel for trade or who sails it in violation of § 2511 or § 2514 of this title, or of the license issued under said § 2511 of this title, shall incur, for each violation, in a misdemeanor punishable as provided in § 2801 of this title.

§ 2517. Public auction sale

The Administrator shall provide in the rules and regulations approved under § 2502 of this title a proceeding for the seizure and sale in public auction of every abandoned ship or merchandise or which illegally obstructs any port, dock or part of a harbor zone, or of every merchandise on which there is pend-

ing a fine or payment under the provisions of this chapter, if the ship or merchandise is not moved or the debt on the merchandise has not been paid within a reasonable term which must be stipulated in the corresponding requirement made by the Authority by serving a written notice thereof to the owner or captain of the ship, or to the agent of any of the two (2), or to the owner or consignee of the merchandise, or by fixing said notice on the ship or on the merchandise in question, if none of said persons could be found or are unknown. From the proceeds of the sale, the Authority shall charge any sums owed by the ship or merchandise under the provisions of this chapter, plus the expenses incurred in removing the obstruction and in the public auction sale procedure. The remaining surplus, if any, shall be given to the person entitled to receive it.

Subchapter VI. Harbor Zones

§ 2601. Delimitation

The Administrator shall delimit, in consultation with the Secretary of Transportation and Public Works and with the approval of the Puerto Rico Planning Board, those parts of the terrestrial maritime zone and other lands adjacent to a port which must become part of its harbor zone. Every harbor zone shall be delimited through regulation approved by the Administrator upon the holding of a public hearing of quasi-legislative character as provided in § 2109 of this title. The Administrator shall give notice of the holding of the public hearing and of the day, hour and place of its holding, by publishing an advertisement to such effect in two (2) or more newspapers of general circulation in Puerto Rico at least fifteen (15) days in advance of the date appointed for the hearing. The hearing shall be held in the city or

town in which the port in question is located, but may be held in the place considered most appropriate by the Administrator should it concern more than one (1) port. The Administrator shall include in the publication of the said notice an appropriate description which he may illustrate with a plan, of the delimitation of the harbor zone or zones which he intends to adopt. After the holding of the public hearing, the Administrator shall approve the corresponding regulations and shall submit same together with the record of the hearing to the Puerto Rico Planning Board. If the regulations are approved by the Planning Board, same shall become effective with force of law after thirty (30) days of its promulgation by the Administrator as provided by law. The Administrator may appeal to the Governor, within the term of thirty (30) days reckoning from the date in which the Board notifies its decision, of any resolution of the Board disapproving or amending the regulation, or may accept the amendments made by the Board. If the Administrator should appeal to the Governor and the latter approved the regulation, for which he may make the amendments which he deems necessary, same shall take effect thirty (30) days after its promulgation as provided by law.

§ 2602. Powers and duties of the Authority

The Authority shall have the control, jurisdiction and administration of every part of the maritime-terrestrial zone included in a harbor zone, and of said zone and all buildings and structures built thereon that are under the control and administration of the Authority, as provided by § 2202 of this title.

§ 2603. Regulatory powers

The Administrator shall approve the rules and regulations to reserve, regulate and plan the mari-

time development of the exclusive use of lands adjacent to the maritime-terrestrial front included in the harbor zone pursuant to the powers granted to the Authority in § 2202, and as provided by § 2109 of this title.

§ 2604. Authorization for constructions, extraction of sand and deposit of merchandise

No person may construct any building, structure, inclosure or fence, nor extract sand in the terrestrial maritime zone included in a harbor zone or deposit therein merchandise or materials of any kind, without a written permit issued by the Authority, as provided by the Administrator through rules or regulations approved in accordance with the provisions of § 2603 of this title. The permit of the Authority shall not be necessary for the construction of the works referred to in § 9 of the act known as the "Rivers and Harbors Appropriation Act of 1899", approved by Congress on March 3 of said year, 30 Stat. 1151, as said section was modified by the "General Bridge Act of 1946", approved by Congress on August 2, 1946, 60 Stat. 849. The permits for the construction of these works in navigable waters not only within but outside the harbor zone shall be given by the Public Service Commission of Puerto Rico in accordance with the provisions of said federal laws.

§ 2605. Violations offense

Every person who illegally constructs any building, structure, inclosure or fence, or who extracts sand in the terrestrial maritime zone included in a harbor zone, or deposits therein merchandise or materials, or who violates any of the provisions of the rules or regulations approved and promulgated by the Administrator in accordance with the power vested by

§ 2603 of this title shall incur, for each violation, in a misdemeanor punishable as provided by section 2801 of this title.

§ 2606. Confiscation powers

The Authority may confiscate or seize, or destroy, any building, structure, inclosure or fence constructed without its authorization in the terrestrial maritime zone included in a harbor zone, if the building, structure, inclosure or fence is not removed from said zone within a term not to exceed sixty (60) days from and after the date in which the Authority orders its removal notifying in writing thereof and of the term required for the removal to the person owner or in possession of the construction, or fixing in the latter said notice if such person is unknown or could not be found.

Any person affected by a determination of the Authority, in the manner previously provided, may request, within the term of five (5) days from and after the date of receiving the notice ordering the removal of the structure referred to in the order, an administrative hearing in which he may present such pertinent proof as he may have in his favor. The decision of the Authority may be reviewed by the Part of the Court of First Instance having jurisdiction on the affected property, by means of an appeal for review to be issued in the discretion of said court, within the term of ten (10) days from and after the sending of the notice of the decision of the Authority.

In every case in which any building, structure, inclosure or fence represents imminent danger to the use of the maritime zone for the public purposes for which it is intended, or which obstructs the use of the maritime zone in such way as to endanger navigation

or the safety of persons and the marine trade in any of the zones devoted to such purpose, the Authority may order the removal or destruction of any of such buildings in a preliminary manner and without the previous requirement of an administrative hearing.

§ 2607. Damages

Every person who incurs in any of the acts prohibited by § 2605 of this title shall be responsible to the Authority for the expenses and damages occasioned by the violation in excess of those which might be compensated by the action that the Authority may take under § 2606 of this title.

Subchapter VIII. Penalties For Offenses

§ 2801. Penalties

The offenses defined in §§ 2302, 2408, 2503, 2516 and 2605 of this title shall be punishable by imprisonment in jail for a maximum term of two (2) years, or by a maximum fine of two thousand dollars ($2,000) or by both penalties. The offenses defined in § 2418 of this title shall be punished as therein provided.

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In the Supreme Court of the United States

INTERNATIONAL SHIPPING AGENCY, INC., PETITIONER
v.
PUERTO RICO PORTS AUTHORITY, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PUERTO RICO PORTS AUTHORITY

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QUESTION PRESENTED

Whether the court below erred in concluding that the Puerto Rico Ports Authority is an arm of the state under the multi-factor test established by this Court in *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994).

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INTRODUCTION

Petitioner's arguments for review are based largely on a misreading of *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), and a failure to acknowledge that decision's apparent impact on the lower courts. As petitioner recognizes, *Hess* established a multi-factor test to determine whether an entity is entitled to sovereign immunity as an "arm of the state." Although the Court did not squarely hold that this inquiry is to be conducted on a "categorical" or entity-wide basis rather than a function-specific basis, the Court's analysis points strongly toward the categorical approach—at least where, as here, the state has indicated a categorical intention that the entity be treated as an arm of the state. In that respect, and in every other respect, the decision below is fully consistent with *Hess*.

Contrary to petitioner's contention that the decision below conflicts with decisions of the First Circuit, the decisions of that court conducting the inquiry on a function-by-function basis were both decided before *Hess*. And that court, while not acknowledging the change, appears to have applied a categorical approach in every case since *Hess*. If in some future case the First Circuit reverts to its pre-*Hess* approach, there will be ample opportunity to address the resulting circuit conflict then.

Nor is there any conflict between the decision below and the other circuit decisions petitioner cites. All those involved entities, unlike the Puerto Rico Ports Authority ("PRPA"), that have authority over a mere county—a context that demands a function-specific approach because counties as such possess no sovereign immunity.

STATEMENT

This case involves three complaints for a total of $124 million filed in the Federal Maritime Commission ("FMC") against PRPA by private users of the Port of San Juan. The complaints challenge the land-use and economic development decisions of the Commonwealth and are framed as allegations of "unreasonable" practices by PRPA under the Shipping Act. An understanding of why the D.C. Circuit properly held that PRPA was an arm of the state, and thus immune from the FMC suit, requires some familiarity with (1) the nature of PRPA; (2) the Commonwealth's plan to develop the Port of San Juan through PRPA; (3) petitioner's challenge to the Commonwealth's plan; and (4) the decision below.

1. *The Puerto Rico Ports Authority.* A creature of statute, PRPA is a "public corporation and *government instrumentality* of the Commonwealth." Puerto Rico Ports Authority Act, 23 L.P.R.A. § 333(b) (the "Enabling Act") (emphasis added). First established in 1942 as the Puerto Rico Transportation Authority, PRPA is now and has always been "government controlled." See Act No. 125 of 1942, § 3(b); Act No. 65 of 1989, § 3(b); 23 L.P.R.A. § 333(b).

PRPA's principal purpose is to "manage any and all types of air *and* marine transportation facilities and services" so as to "promot[e] the general welfare and increas[e] commerce and prosperity" of the Commonwealth. 23 L.P.R.A. § 333 *et seq.*, § 336 (emphasis added). By statute, PRPA also acts as a "facilitator . . . of the development of the economic sectors that drive the present Puerto Rico Economy," including tourism. Act No. 65 of 1989. Not surprisingly, PRPA's purposes are deemed "public

purposes for the benefit of the people of Puerto Rico." 23 L.P.R.A. § 348. And all projects deemed necessary by PRPA are declared of "public utility." *Id.* § 349.

PRPA is governed by a Board appointed by the Governor. 23 L.P.R.A. § 334. And four of the five Board members are high-ranking Commonwealth officials who may be removed from their positions at will by the Governor: (1) the Secretary of Transportation and Public Works, the statutory Chairman; (2) the Secretary of Commerce; (3) the Economic Development Administrator; and (4) the Executive Director of the Tourism Company, also an arm of the Commonwealth. *Ibid.* The remaining member is a private citizen. 23 L.P.R.A. § 334. A majority of directors constitutes a quorum, *ibid.*; thus, Commonwealth officials control the Board.

PRPA's chief executive officer is its Executive Director. 23 L.P.R.A. § 335. By statute, the Board appoints the Executive Director, *id.* § 334, but as a practical matter, the Board appoints the person recommended by the Governor. And both the Executive Director and the Board report to the Governor. App. 354-356.[1]

PRPA also enjoys sweeping governmental powers. These include the authority to (1) "prescribe . . . such rules and regulations as may be necessary and proper for the exercise and performance of its powers and duties," 23 L.P.R.A. § 336(d); (2) conduct investigations, issue subpoenas, and levy fines, *id.* §§ 2109, 2203, 2205, 2603; (3) "exercise the power of eminent domain, *id.* §§ 336(h), 339, 339(a); and (4) hold hear-

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[1] Unless otherwise noted, all citations are to the appendix on appeal ("App.") or to the Petitioner's Appendix ("Pet. App.").

ings and enact "rate regulations," *id.* § 336. Moreover, all Puerto Rico harbors, waters, submerged lands, and the terrestrial maritime zone, including all buildings and structures built thereon, are under PRPA's "control, jurisdiction, and administration." *Id.* §§ 2202, 2602. PRPA thus controls not only all air traffic into and out of the Commonwealth, but also the movement of ships, passengers, and cargo into and out of Puerto Rico's harbors. *Id.* §§ 2401, 2501. Because Puerto Rico is an island, these powers are central to its economic health.

In keeping with its extensive powers, PRPA is also subject to extensive control and accountability by the Commonwealth. For example, PRPA must submit annual reports of "all its undertakings and activities" to the Legislature and the Governor. *Id.* § 345. Other statutes govern its administrative procedures, *id.* § 336; specify its procurement processes, *id.* § 341; require it to maintain accounts in Commonwealth-approved depositories, *id.* § 345; and submit to audits by the Commonwealth Controller, which are reported to the Governor and Legislature, *id.* § 338. PRPA is further subject to the mandates of the Commonwealth's Code of Ethics. 3 L.P.R.A. §§ 1755, 1758, 1831.

PRPA also enjoys governmental privileges in litigation, even in Commonwealth courts. *First*, injunctions cannot be entered against PRPA. 23 L.P.R.A. § 351, 32 L.P.R.A. § 3524. *Second*, while PRPA may issue bonds, 23 L.P.R.A. § 349, a creditor may not interfere with PRPA's operations or liquidate its assets. *Id.* § 343(e). And *third*, an action alleging fault or negligence against PRPA acting as an agent of the Commonwealth must be brought against the Commonwealth itself. 23 L.P.R.A. § 2303(b).

For all these reasons, in the proceedings below the Commonwealth Solicitor General expressed the sovereign's unequivocal view that "the Ports Authority is an arm of the Commonwealth for purposes of sovereign immunity from suits under federal law." App. 300.

2. *The Commonwealth's Port of San Juan Redevelopment Project.* In 1996, having concluded that tourism represented the driving force for future economic development, the Commonwealth began to redevelop the waterfront bordering historic Old San Juan and began plans to construct a new convention center, creating a tourist-friendly "Golden Triangle." App. 363-366. (Hon. Pedro Rosselló, Governor of Puerto Rico, Keynote Address at 4-7 ("Governor's Address") (Nov. 18, 1998)). The project required demolition of Port warehouses and relocation of cargo operations. It also called for the use of waterfront and adjoining land for tourism-related facilities, including cruise ship terminals and a convention center. App. 228-229; App. 362-366.

In June 1998, Governor Rosselló summoned PRPA's Executive Director, the Maritime Bureau Chief, and members of the PRPA's Board of Directors (the "Board"), including its chairman, the Secretary of the Department of Transportation, and others to the Governor's mansion. There, as part of the Golden Triangle project, he ordered the removal of warehouses along the San Antonio Channel to permit redevelopment of the waterfront for cruise ships. App. 339-343. The next day, PRPA's Executive Director instructed his staff to execute the Governor's orders. App. 342-343 (The Executive Director said, "I want this done as you heard yesterday"). Then, Maritime Bureau Chief Carrión met with Port users,

including petitioner, and informed them that PRPA was carrying out the Governor's orders regarding the Golden Triangle. *Ibid.* In November 1998, the Governor's aides and other officials, including the Secretary of Transportation, met again with PRPA's Executive Director to "fast track" the Golden Triangle. App. 343-344.

Around this same time, Governor Rosselló discussed the Golden Triangle project at a public meeting, stating that "[n]umerous government agencies will support this initiative under the watchful eye of our Department of Economic Development and Commerce," including: (1) the Department of Transportation and Public Works, (2) the Tourism Company, and (3) the PRPA. Regarding the PRPA, he explained:

> [PRPA] . . . will be . . . improving the aesthetics and the efficiency of our ship-handling activity by relocating cargo operations away from Old San Juan and Puerta de Tierra, so that none of our cruise-line passengers will find themselves boarding or disembarking amid piers that are utilized by freighters and tankers.

App. 364.

3. *Petitioner's Challenge To The Commonwealth's Economic Development Plan.* In the wake of these decisions, private parties, including petitioner, filed actions in the FMC challenging the Commonwealth's decisions, including the Governor's order to demolish warehouses. Petitioner admitted that PRPA is engaged in development of the Port, including the development of a public terminal funded by the Government Development Bank for Puerto Rico ("GDB"), to "better serve the economy of Puerto Rico."

App. 40. Moreover, although petitioner did not use the words "Golden Triangle" in its complaint, the events complained of directly related to that project and the Governor's order to demolish warehouses.[2]

PRPA moved for summary judgment on the ground that it was immune from suit as an arm of the Commonwealth. A bare majority (3-2) of the FMC held that PRPA was not an arm of the state.

4. *The Decision Below.* A unanimous panel of the D.C. Circuit reversed. Relying chiefly upon *Hess*, the court examined whether PRPA was an arm of the state using three factors: "(1) the State's intent as to the status of the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." Pet. App. 8a (citing *Hess*, 513 U.S. at 44-66) (other citations omitted). At the outset, the court observed that under this test, "an entity either is or is not an arm of the State"; that is, "the status of an entity does not change from one case to the next based on the nature of the suit." *Ibid.*

Considering the Commonwealth's *intent*, the Court observed that Puerto Rico law describes PRPA as a "government instrumentality of the Commonwealth of Puerto Rico" and a "government controlled corporation." Pet. App. 11a (citations omitted). While PRPA's functions included managing transportation facilities, which *Hess* notes "are not readily classified as typically state" functions, the court ob-

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[2] Specifically, petitioner alleges that PRPA (1) "forcibly evicted it from facilities; (2) unlawfully refused to lease land "because it had been designated for Puerto Rico government projects"; and (3) "unlawfully den[ied] petitioner berthing." App. 408, 414-415. All of these alleged actions were components of the Golden Triangle project.

served that PRPA performed these functions to "promote 'the general welfare'" and to increase "commerce and prosperity for the benefit of the people of Puerto Rico." Pet. App. 13a (citations omitted). Further, the court noted that other Puerto Rico laws, such as the Commonwealth's Administrative Procedures Act, suggested that PRPA was an arm of the state, as did the Commonwealth's representations in court. *Ibid.*

The Commonwealth's *control* over PRPA, the court held, also "weighs heavily" in favor of immunity. Pet App. 16a. In particular, the court found it significant that four of five PRPA directors were government officials, served by virtue of their offices, and "perform[ed] their services for PRPA as part of their official government duties; they receive no extra or separate compensation." *Ibid.* This, the court reasoned, shows "that the Commonwealth (which can act only through its officers) directly controls PRPA." *Ibid.*

Finally, the Court looked to PRPA's "overall effects" on the Commonwealth's *treasury*. Pet. App. 19a. Though PRPA's debts are not the Commonwealth's, the court observed, it is financed largely through fees and bonds "like many similarly created governmental entities." Pet. App. 20a. Further, the Commonwealth is "directly liable for certain torts committed by PRPA's officers . . . when they are acting in their official capacity and within the scope" of their work. Pet. App. 21a (citation omitted). Hence, "[s]ome of PRPA's actions can give rise to legal liability for the Commonwealth, and payment for judgments in those suits comes out of the Commonwealth's coffers." *Ibid.* According to the court, therefore, the "treasury" factor likewise favored treating PRPA as an arm of the state. Pet. App. 22a.

Taking these factors together, the court concluded, PRPA was an arm of the Commonwealth. *Ibid.*

REASONS FOR DENYING THE PETITION

I. There Is No Present Conflict Among The Circuits On The Categorical Approach To Determining Whether An Entity Is An Arm Of The State

Petitioner errs first in asserting that the decision below conflicts with decisions in other circuits on the categorical nature of the "arm-of-the-state" inquiry. Pet. 8-9. As we will show, although a couple of First Circuit decisions issued before *Hess* take a function-specific approach, the First Circuit has declined to follow that approach in its four decisions since *Hess*. And the other circuit decisions petitioner cites deal with the sovereign immunity of county sheriffs—a context where a functional approach is necessary simply because *county* sheriffs cannot categorically be arms of the *state*.

A. The First Circuit has applied the categorical approach to state-wide entities since *Hess*, and should it change course this Court will have ample opportunity to correct the error.

Before *Hess*, the First Circuit employed a function-specific approach in two cases, both of them involving PRPA. See *Puerto Rico Ports Auth.* v. *M/V Manhattan Prince*, 897 F.2d 1, 10 (1st Cir. 1990) ("whether the PRPA is entitled to Eleventh Amendment protection depends upon the type of activity it engages in and the nature of the claim asserted against it"); *Royal Caribbean Corp.* v. *Puerto Rico Ports Auth.*, 973 F.2d 8, 9 (1st Cir. 1992) (court

"must" answer Eleventh Amendment question in respect to the particular "type of activity"). But then came *Hess*, and the First Circuit silently changed course. In four published cases, the Court has decided whether an entity was an arm of the state as a categorical matter. For example, in *Fresenius Medical. Care Cardiovascular Resources, Inc.* v. *Puerto Rico & The Caribbean Cardiovascular Center Corp.*, 322 F.3d 56, 75 (1st Cir. 2003), the court considered whether a state-created medical center, as such, was an arm of state. Thus, it examined the "[s]tructuring of PRCCCC" (the entity at issue) and whether "the Commonwealth's [t]reasury [would] [b]e [o]bligated to [p]ay a [j]udgment [a]gainst PRCCCC," and concluded that "PRCCCC is not an arm of the state"—all without giving any weight to the specific function at issue. 322 F.3d at 68, 72, 75.

The First Circuit has taken the same approach in the following cases, all decided after *Hess*:

- *Breneman* v. *United States ex rel. Federal Aviation Administration*, 381 F.3d 33, 39 (1st Cir. 2004), which analyzed whether a state aeronautics commission was "an arm of the state," without considering its specific function in that case;
- *Redondo Construction Corp.* v. *Puerto Rico Highway & Transportation Authority.*, 357 F.3d 124, 128-29 (1st. Cir. 2004), which affirmed "the district court's decision that the Puerto Rico Highway and Transportation Authority is not an arm of the state," without considering its specific functions; and again in
- *Pastrana-Torres* v. *Corporacion de Puerto Rico Para La Difusion Publica*, 460 F.3d 124, 125, 128

(1st Cir. 2006), which affirmed the lower court's ruling that a state-created broadcasting station "is not an arm of the Commonwealth."

In short, if the function-specific test in the First Circuit is not dead, it is in deep dormancy.

Despite the First Circuit's consistent failure to apply the function-specific test since *Hess*, petitioner asks this Court to grant review because the First Circuit *might* suddenly revive that test in a suit involving the PRPA. But that is pure speculation. It is true, as petitioner notes, that the First Circuit has favorably cited *Royal Caribbean* (one of its other PRPA cases) in one of its recent decisions. But until a case arises involving PRPA, it is impossible to tell whether the First Circuit would continue to employ its post-*Hess* categorical approach, or revert to the old rule.

If such a case arose in the First Circuit, PRPA would obviously press for the categorical approach and urge that court to follow the decision below. PRPA would also emphasize that the very nature of the *Hess* test favors continued use of the categorical approach. As the court below noted, *Hess* requires considering "state intent, including the entity's functions; state control; and the entity's overall effects on the state treasury." Pet. App. 9a. Each of these factors lends itself to an all-or-nothing conclusion: In the ordinary case, either the state intended the entity to be an arm of the state or it did not; either the state controls the entity or it does not; and either the entity affects the state treasury or it does not. That is no doubt why the test is called the "*arm* of the state" test, not the "function of the state" test.

In any event, if petitioner is correct, the party

most affected by this inconsistency is PRPA, which could be subject to suit in the First Circuit but not in the D.C. Circuit. Thus, if a panel of the First Circuit were to adhere to its old approach as to PRPA, PRPA would have every incentive to challenge that decision. And PRPA would do so—*first*, by asking the First Circuit *en banc* to conform the panel decision to *Hess* and the D.C. Circuit's decision here; and *second*, if necessary, by petitioning for review in this Court. As it is, review by this Court is premature.

B. None of Petitioner's "county sheriff" cases holds that whether a statewide entity is an arm of the state must be determined on a function-specific basis.

Nor is there any merit to petitioner's argument that the decision below creates a further split because the Seventh, Ninth, and Eleventh Circuits have considered whether "an entity is an arm of the state is an all-or-nothing proposition," and have acknowledged that states "*may* create entities to have multiple roles." Pet. 6-7 (emphasis added). Nothing in the decision below imposes any limits on the states' *ability* to create entities that expressly enjoy sovereign immunity for some purposes but not others. The decision merely holds that in the ordinary case, like this one, where the state has created an entity without drawing distinctions among its various functions, the arm-of-the-state question should be addressed on a categorical basis.

Moreover, all that these other cases establish is that a function-specific approach is appropriate when plaintiffs bring claims against *county sheriffs*.[3] By

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[3] *DiGenova* v. *Sheriff of DuPage County*, 209 F.3d 973, 875 (7th Cir. 2000) ("whether a sheriff acts for the State or a local

definition, county sheriffs oversee counties, which "do not enjoy Eleventh Amendment immunity." *Hess*, 513 U.S. at 47 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977)). Thus, if a county sheriff is to claim immunity, he must do so only as to one of his specific functions—otherwise, he would effectively be claiming that the county itself was entitled to immunity. It follows, therefore, that petitioner's "county sheriff" cases simply could not have held that the sovereign immunity status of a statewide, state-created entity like PRPA must be determined on a function-specific basis. And indeed, petitioner offers no basis to believe the county sheriffs in these cases asked for all-purpose arm-of-the-state treatment. Accordingly, these cases simply cannot be read as having reached a square holding on the question petitioner seeks to present. And they therefore cannot be—and are not—in conflict with the decision below.

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entity is not an all or nothing determination"); *Scott* v. *O'Grady*, 975 F.2d 366, (7th Cir. 1992) ("[t]he fact that [the sheriff and deputy sheriff] normally act as county officials does not mean that they can *never* act as an arm of the state") (emphasis in original); *Abusaid* v. *Hillsborough County Bd. of Commissioners*, 405 F.3d 1298, 1203 (11th Cir. 2005) ("the question is not whether the sheriff acts for the state or the county in some all-or-nothing-manner, but rather whether the sheriff is acting for the state in a particular area, or on a particular issue") (citation omitted); *Manders* v. *Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (*en banc*) ("We need not answer, and do not answer, today whether Sheriff Peterson wears a 'state hat' for any other functions [besides establishing the county jail's use-of-force policy and overseeing deputies]."); *Streit* v. *County of Los Angeles*, 236 F.3d 552, 566 (9th Cir. 2001) ("We are satisfied that the [Los Angeles County Sheriff's Department] is not acting as an arm of the state when administering the local county jails.").

C. Nothing in the decision below suggests the court would have reached a different result if it had conducted a function-specific analysis.

It is also likely that the court below would reach the same result even if it had applied the function-specific approach that the First Circuit applied before *Hess*. Indeed, petitioner does not even argue that the court below would have reached a different result had it done so.

Here, PRPA's specific function was implementing the economic and land-use priorities of the Governor to promote tourism in and around the Port. As to this function, the Commonwealth's *intent* was plain—as a matter of both legislative mandate and direct order of the Governor—specifically concerning the Golden Triangle project. That project called for tourist-friendly development, as opposed to cargo operations. App. 363-366. Because statute establishes PRPA as a facilitator of tourism, Act No. 65 of 1989, and the Commonwealth's instrumentality with jurisdiction over Port lands and structures in the Golden Triangle, 23 L.P.R.A. § 336, the Governor utilized PRPA to implement portions of the project. App. 364. Thus, the Governor was plainly using PRPA as an arm of the state as to the events at issue here.

Moreover, it was uncontested that the Governor ordered buildings torn down by PRPA to make way for the project. App. 228-229. This demonstrates the Governor's—and the Commonwealth's—*control* over the PRPA.

And finally, as to the effect on the Commonwealth's *treasury*, there is no question that PRPA is "financed largely through user fees and bonds," and

the Commonwealth is potentially liable by statute for certain torts committed by PRPA's officers. Pet. App. 20a (citing 23 L.P.R.A. § 336(l)(1)). In addition, as the Commonwealth pointed out below, PRPA's economic importance to Puerto Rico means that, as a practical matter, the Commonwealth would be forced to stand behind PRPA if it encountered financial difficulty. Moreover, the Commonwealth faces these financial risks, not just from PRPA's general operation, but from the specific "function" at issue here—*i.e.*, the implementation of the Government's land-use and economic development priorities and directives.

In short, the court below would very likely reach the same conclusion as to PRPA's status if it were directed to address that issue on a functional rather than categorical basis. For that reason too, even if there were a conflict on that issue, this case would be a poor vehicle with which to resolve it.

II. The D.C. Circuit's Application Of The *Hess* Test Is Consistent With The Precedents Of This Court And Other Circuits

Petitioner is also incorrect in contending that the decision below departed from *Hess* itself—either in its analysis of "structural" factors, or in its analysis of the risk PRPA poses to the Commonwealth treasury.

A. The D.C. Circuit's analysis of PRPA's "structural functions" does not conflict with *Regents*, *Hess*, or decisions in other circuits.

In that regard, petitioner first argues that the D.C. Circuit's analysis does not "balance" properly all of *Hess*'s "structural indicators of immunity." Pet. 11. Specifically, petitioner faults the court below for supposedly ignoring statutory signals involving PRPA's

status and autonomy. Pet. 11-14. But in fact, the D.C. Circuit conducted a meticulous inquiry on both scores, see Pet. 12 n.3, but simply did not balance the factors as petitioner had hoped.

1. In examining PRPA's status, the D.C. Circuit considered four questions:

- Whether Puerto Rico law expressly characterizes PRPA as a government instrumentality;
- Whether PRPA performs governmental functions;
- Whether PRPA is treated as a government instrumentality under other Puerto Rico laws; and
- Puerto Rico's representations in this case.

Pet. App. 11a-15a. In answering those questions, contrary to petitioner's assertions, the D.C. Circuit considered possible contrary indicators. For example, the court recognized that managing air and marine facilities "[is] not readily classified as typically state as opposed to local governmental functions." Pet. App. 13a (citing *Hess*, 513 U.S. at 45)). Yet the Court also observed that PRPA performed these functions "to promote the general welfare" and to "increase commerce and prosperity for the benefit of the people of Puerto Rico." *Ibid.* (citations omitted). Thus, the Court held that whatever mixed signals might be sent by aspects of PRPA's responsibilities, they were overwhelmed by signs that PRPA was an arm of the state. Pet. App. 9a-10a.

In *Hess*, by contrast, conflicting signals left the arm-of-the-state question unresolved: "Port Authority functions are not readily classified as typically State or unquestionably local," this Court noted, and "[t]his consideration, therefore, does not advance our inquiry." *Hess*, 513 U.S. at 45. But here, these func-

tions were supplemented by the Commonwealth's own statements, in its statutes and its statements before the FMC and the court, about PRPA's purposes, including the general welfare and the promotion of a strong island economy. The decision below reasonably (indeed, correctly) concluded that when the various "structural" factors were considered in light of these statements, they *did* "advance" the inquiry.

Similarly, in *Hess* the port authority was not "type[d]" as a state agency. 513 U.S. at 44-45. But here, by contrast, the PRPA was expressly classed, by statute, as a "government instrumentality . . . and a government controlled corporation." Pet. App. 3a. "That statutory language," the court below correctly held, "plainly demonstrates Puerto Rico's intent to create a government instrumentality of the Commonwealth and thus strongly suggests that PRPA is an arm of the Commonwealth." Pet. App. 11a-12a.

In other words, unlike in *Hess*, the court below did not consider the indicia of Puerto Rico's intent to be in equipoise: The Commonwealth itself declared PRPA to be an instrumentality of and controlled by the state, and no contrary evidence was sufficient to offset that unqualified declaration.[4]

2. So too as to the control factor. In *Hess*, this Court explained that, "while 8 of the Port Authority's

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[4] Petitioner notes that this Court's statement in *Regents of the University of California* v. *Doe*, 519 U.S. 425, 429 (1997), that a "state instrumentality may invoke the State's immunity" merely shows that the word "instrumentality" is not dispositive. But contrary to petitioner's suggestion, Pet. 12-13, the court below did not rely solely on the word "instrumentality"—it also relied on PRPA's statutory description as a "government controlled corporation." Pet. App. 2a.

12 commissioners must be resident voters of either New York City or other parts of the Port of New York District, this indicator is surely offset by the States' controls." *Hess*, 513 U.S. at 49 (footnote omitted). Here, by contrast, "a majority of [PRPA's] directors are high officers in the Commonwealth who hold their directorships because of their positions in the government"; "perform their services for PRPA as part of their official government duties"; and "receive no extra or separate compensation for their board duties." Pet. App. 16a.

In light of these facts, the D.C. Circuit reasoned, "the Commonwealth (which can only act through its officers) directly controls PRPA." *Ibid.* Further, the Puerto Rico Attorney General opined that the Governor of Puerto Rico controls all its public corporations, including the port authority. Pet. App. 17a. Unlike the port authority in *Hess*, then, the court below was able to conclude that the facts "more than suffice" to demonstrate that the Commonwealth "directly controls" PRPA. Pet. App. 18a.

B. The D.C. Circuit's "risk to the treasury" analysis is fully consistent with *Hess*.

Petitioner further contends that the D.C. Circuit erred in gauging PRPA's overall effect on the Commonwealth's treasury, "[r]ather than looking at any judgment that might be awarded in *the case being litigated*." Pet. 15 (emphasis in original). Remarkably, petitioner does not cite authority for this proposition—from this or any other court. And in fact, *Hess* analyzed the effect on the State's treasury at the broadest possible level, considering "[t]he Port Authority's *anticipated* and actual financial independence – its *long history* of paying its own way."

513 U.S. at 49 (emphasis added).

Under *Hess*, then, the D.C. Circuit got it right when it declared that forcing sovereign immunity to turn on whether the State paid the judgment "would inappropriately convert a *sufficient* condition for sovereign immunity into the single *necessary* condition for arm-of-the-state status. That is not the law. . . ." Pet. App. 19a (emphasis in original) (citing *Hess*, 513 U.S. at 45-46; *Lake Country Estates* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401-401 (1979); *Mt. Healthy*, 429 U.S. at 280)).

In short, the D.C. Circuit properly followed the balancing test in *Hess*. Accordingly, even if error-correction were a ground for granting certiorari, review would be unwarranted here.

III. The Failure Of The United States And The Federal Maritime Commission To File A Petition Shows That The Decision Below Poses No Serious Threat To Federal Interests

Finally, petitioner warns that "there is a significant risk of additional entities being treated as arms of the state in the D.C. Circuit while at the same time being treated as independent entities in their home circuits," because the decision below was rendered in a circuit where "a large number of federal agency cases are brought." Pet. 18. Petitioner's concern is unfounded: Certainly the United States and the Federal Maritime Commission, which was a respondent in the court below, know their way to this Court. Yet they elected not to file a petition. And that decision demonstrates the lack of any serious federal interest in the issues presented.

There is, however, one non-party interested in this case—the Commonwealth itself, which filed a

brief in the court below supporting PRPA's status as an arm of the state. As the D.C. Circuit noted, since state intent is a component of the *Hess* arm-of-the-state test, courts "must respect" Puerto Rico's representations as to PRPA's status. Pet. App. 14a. Those representations confirm that the court below decided this case correctly, and that further review is unwarranted.

CONCLUSION

At bottom, petitioner simply asks this Court to correct what it perceives as an error in the D.C. Circuit's application of a multi-factor balancing test, rather than to resolve any meaningful difference with another circuit on what that test is. If it were so inclined, this Court could make a cottage industry of second-guessing circuit courts in the application of balancing tests. But that is not the Court's role. And accordingly, the petition should be denied.

Respectfully submitted.

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No. 08-457

In the Supreme Court of the United States

INTERNATIONAL SHIPPING AGENCY, INC.,
PETITIONER

v.

PUERTO RICO PORTS AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether respondent Puerto Rico Ports Authority is an arm of the Commonwealth of Puerto Rico entitled to invoke the Commonwealth's immunity from a federal administrative adjudication initiated by a private complainant.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 531 F.3d 868.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2008. The petition for a writ of certiorari was filed on October 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Puerto Rico Ports Authority Act, 23 L.P.R.A. §§ 331 *et seq.*, the Puerto Rico Ports Authority (PRPA) was established in 1955 as successor to the Puerto Rico Transportation Authority. PRPA is a "public corporation and government instrumentality of the Commonwealth of Puerto Rico" (Commonwealth). *Id.*

§ 333(a) (1999). It has "a legal existence and personality separate and apart from those of the Government and any officials thereof." *Id.* § 333(b). PRPA is governed by a Board of Directors—consisting of four officials of the Commonwealth government who serve in ex-officio capacity, and a private citizen nominated by the Governor—and its day-to-day operations are directed by an Executive Director appointed by the Board. *Id.* §§ 334, 335.

PRPA was created "to develop and improve, own, operate, and manage any and all types of air and marine transportation facilities and services." 23 L.P.R.A. § 336 (Supp. 2006). PRPA is authorized to "sue and be sued," to "make contracts," to acquire property "in any lawful manner" (including the exercise of eminent domain), and to dispose of property. *Id.* § 336(e), (f), (h) and (q). PRPA is authorized to make its own expenditures "without regard to the provisions of any laws governing the expenditures of public funds," *id.* § 336(d), and its "debts, obligations, contracts, [and] bonds" are those of the "government controlled corporation, and not those of the Commonwealth" or any "department" or "agent" thereof. *Id.* § 333(b) (1999). PRPA is exempt from the payment of taxes and other government fees, but instead pays the first $400,000 of its net annual income, if any, to the Commonwealth. *Id.* §§ 348(a) and (b), 354. PRPA's organic statute authorizes PRPA to "do all acts or things necessary or convenient to carry out the powers granted to it," while specifying that PRPA "shall have no power at any time or in any manner to pledge the credit or taxing power of the Commonwealth." *Id.* § 336(v) (Supp. 2006).

PRPA is authorized to issue its own bonds, 23 L.P.R.A. § 342(a) (1999), and may pledge "all or any

part" of its future income to secure the bonds, *id.* § 342(e)(1). Like PRPA's other debts, "[t]he bonds and other obligations issued by [PRPA] shall not be a debt of the Commonwealth" or its political subdivisions, "nor shall such bonds or other obligations be payable out of any funds other than those of [PRPA]." *Id.* § 346. If PRPA defaults on its bonds, bondholders may request the appointment of a receiver of PRPA's undertakings, who may "take possession of such undertakings * * *, and may exclude the Authority, its officers, agents, and employees * * * wholly therefrom and shall have, hold, use, operate, manage, and control the same * * * as the receiver may deem best," with the limitation that the receiver may not sell or mortgage PRPA's property. *Id.* § 343(a), (b) and (e).

In 1968, the Commonwealth legislature enacted the Dock and Harbor Act of Puerto Rico (Dock and Harbor Act), 23 L.P.R.A. §§ 2101 *et seq.* (2006). The Dock and Harbor Act gave PRPA "control of the navigation and the marine trade in navigable waters of Puerto Rico and in its harbors and docks." *Id.* § 2201. Pursuant to that Act, PRPA is empowered to regulate "navigation and marine trade," "pilot service in the harbors of Puerto Rico," and "the movement of ships, passengers and cargo," and it is authorized otherwise to administer "every part of the maritime-terrestrial zone included in a harbor zone." *Id.* §§ 2301, 2401, 2501, 2602. Under the Dock and Harbor Act, damages caused by the acts or omissions of any PRPA officer or employee "while acting in his official capacity and within the scope of his function, employment or commitment as an agent of the Government of the Commonwealth of Puerto Rico under the provisions of this chapter [*i.e.*, the Dock and Harbor Act] (in contraposition as when acting in the exercise of

the property rights of the Authority as a public corporation)," shall be the exclusive liability of the Commonwealth. *Id.* § 2303(b).

2. Since 1961, petitioner has provided stevedoring and marine terminal operator services to ocean common carriers in the Port of San Juan. In 1994, petitioner filed a complaint against PRPA before the Federal Maritime Commission (FMC or Commission), alleging that PRPA had violated the terms of a lease agreement and had extended discriminatory advantages to a competitor. C.A. App. 408. The parties settled that dispute in 1996, and a lease agreement for Piers M, N, and O reflecting that settlement was filed with the FMC in December of that year. *Id.* at 408-409.

In 2004, petitioner filed a new complaint against PRPA for, *inter alia*, alleged breach of its obligations under the Piers M/N/O agreement. Petitioner asserted that PRPA's actions violated Section 10(a)(3), (b)(10), and (d)(1), (3) and (4) of the Shipping Act of 1984, 46 U.S.C. App. 1709(a)(3), (b)(10) and (d)(1), (3) and (4), and sought damages in excess of $50 million, as well as an order directing PRPA to cease and desist its violations of the Act. C.A. App. 425-426. Two other marine terminal operators also filed complaints against PRPA before the FMC. Pet. App. 32a-33a.

PRPA moved to dismiss the complaints on the ground that it is an arm of the Commonwealth and therefore is entitled to sovereign immunity. The Commission, by a vote of 3-2, declined to dismiss the complaints. Pet. App. 30a-75a. The FMC majority recognized that PRPA's authorizing statute makes it a "public corporation and government instrumentality" and that, through the four members of the governor's cabinet who serve as ex-officio members of PRPA's five-member

board, the Commonwealth effectively controls PRPA. *Id.* at 36a, 44a. The Commission found, however, that PRPA nevertheless exercises substantial independence from the Commonwealth government. *Id.* at 44a. The FMC emphasized that the Commonwealth would not be liable for any judgment against PRPA in the complaint proceeding because Puerto Rico law provides that PRPA's debts "are those of said government controlled corporation, and not those of the Commonwealth." *Id.* at 45a-55a. It also ruled that PRPA had not shown that the actions petitioner complained of were the result of any order of the governor. *Id.* at 55a-58a. The two dissenting commissioners concluded that, in light of the Commonwealth's substantial powers over PRPA, that entity should be treated for all purposes as an arm of the Commonwealth, even though the Commonwealth would not be liable for any FMC judgment. *Id.* at 67a-68a.

3. The court of appeals reversed and directed the Commission to dismiss the complaints. Pet. App. 1a-29a. The court first observed that, under circuit precedent that the parties did not challenge, the Commonwealth enjoys the same immunity pursuant to the Puerto Rican Federal Relations Act, 48 U.S.C. 734, that States possess by virtue of the Eleventh Amendment. Pet. App. 6a & n.1. The court therefore found it unnecessary to decide whether the Commonwealth enjoys immunity as a constitutional matter. See *id.* at 6a n.1.

In determining that PRPA was immune from an FMC proceeding initiated by a private party, the court of appeals started from the proposition that "an entity either is or is not an arm of the State." Pet. App. 8a. The court held that the proper inquiry involves consideration of three factors: "(1) the State's intent as to the status of the entity, including the functions performed

by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." *Ibid.*

The court found several indicia that the Puerto Rico government intended to make PRPA an arm of the Commonwealth. Those included the statutory designation of PRPA as a "government instrumentality" and "government controlled corporation," Pet. App. 11a-12a; PRPA's role in the development and management of marine and terminal facilities, which it is to conduct for the benefit of the public, *id.* at 12a-13a; the Commonwealth's decision to apply various administrative procedure and civil service laws to PRPA and to review PRPA's finances, *id.* at 13a-14a; and the amicus brief of the Commonwealth arguing that PRPA is an arm of the Commonwealth, *id.* at 14a-15a (quoting 23 L.P.R.A. § 333(a) and (b) (1999)).

With respect to government control, the court noted that four of the five members of PRPA's Board of Directors are cabinet members whom the governor may remove from their cabinet positions at will, and that the fifth is a private citizen appointed to the Board by the governor. Pet. App. 16a-17a. The court further observed that the board appoints PRPA's executive director and that the current executive director is the Commonwealth's Secretary of State. *Id.* at 17a. The court of appeals relied as well on a 1992 opinion of the Puerto Rico attorney general that the governor retains control of public corporations, and on evidence of the governor's orders to PRPA management with respect to redeveloping the port for tourism in the area of Old San Juan. *Id.* at 17a-18a.[1]

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[1] The court referenced the redevelopment of San Juan's waterfront as "the facts in this case," Pet. App. 18a, but it does not appear from pe-

As to PRPA's effect on the Puerto Rico treasury, the court determined that it "must consider the entity's overall effect," "not whether the State would be responsible to pay a judgment *in the particular case at issue.*" Pet. App. 18a-19a. While acknowledging that PRPA's organic statute generally makes PRPA's debts separate from those of the Commonwealth, the court observed that the Dock and Harbor Act, 23 L.P.R.A. § 2303 (2006), renders the Commonwealth liable for certain torts committed by PRPA employees. Pet. App. 20a-21a. The court viewed that provision as establishing that PRPA's actions do affect the Commonwealth's treasury in some circumstances. *Id.* at 21a-22a.

The court of appeals recognized (Pet. App. 10a n.3) an apparent conflict between its holding and that of the First Circuit in *Royal Caribbean Corp.* v. *PRPA*, 973 F.2d 8 (1992). In *Royal Caribbean*, the First Circuit concluded that PRPA's status as an arm of the Commonwealth depended upon the particular activity at issue in a given case, see *id.* at 9, and it held that PRPA was not entitled to immunity in the case before it, see *id.* at 10-12. The D.C. Circuit in this case concluded, however, that the First Circuit had "expressly departed from that narrow focus" in its subsequent decision in *Fresenius Med. Care Cardiovascular Res., Inc.* v. *Puerto Rico & the Caribbean Cardiovascular Ctr. Corp* , 322 F.3d 56, cert. denied, 540 U.S. 878 (2003).

Judge Williams concurred in the majority's opinion but wrote separately to note his disagreement with this Court's more recent arm-of-the-State analysis. Pet. App. 24a-29a. In his view, the test that the Court had

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titioner's complaint before the FMC that its claims arise out of the redevelopment project, see p. 4, *supra*.

applied until recently—under which a state-created separate legal personality, with authority to sue and be sued, did not enjoy the State's immunity—was both more sound doctrinally and more easily administrable. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-17) that the court of appeals erred in holding that PRPA is immune from the FMC's jurisdiction over petitioner's complaint. That question does not warrant this Court's review at this time. Although the decision below conflicts with a prior ruling of the First Circuit holding that PRPA is not an arm of the Commonwealth entitled to sovereign immunity when PRPA acts in a proprietary capacity, *Royal Caribbean Corp.* v. *PRPA*, 973 F.2d 8 (1992), it is unclear whether the First Circuit will adhere to the approach it took in *Royal Caribbean* in light of intervening decisions of this Court and of the First Circuit itself. Until the First Circuit clarifies its current understanding as to PRPA's susceptibility to FMC adjudication of private complaints, review by this Court would be premature.

1. Through the first part of the 20th century, this Court held that a State-created instrumentality established as "a separate legal person, with the capacity to sue and be sued," should be treated as an "entit[y] apart from the state itself" that could not assert the State's sovereign immunity from private suits. Pet. App. 24a (Williams, J., concurring); see *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922); *Hopkins* v. *Clemson Agric. Coll.*, 221 U.S. 636, 645 (1911); *Barnes* v. *District of Columbia*, 91 U.S. (1 Otto) 540, 544-545 (1876); *Bank of the Com-*

monwealth of Ky. v. *Wister*, 27 U.S. (2 Pet.) 318, 323 (1829). More recently, however, the Court has adopted a multi-factor analysis to determine whether an entity is an "arm of the State" and therefore enjoys the State's immunity. See, *e.g.*, Pet. App. 26a-29a (Williams, J., concurring); *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44-51 (1994); *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979); *Mount Health City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280-281 (1977).

The courts of appeals have identified various factors that are potentially relevant to the determination whether a particular entity is an "arm of the State." In this case, the court of appeals identified three such factors: "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." Pet. App. 8a. Cf. *Fresenius Med. Care Cardiovascular Res., Inc.* v. *Puerto Rico & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 65 n.7 (1st Cir.) (identifying four factors, the first corresponding to the D.C. Circuit's second factor, the second and third corresponding to the D.C. Circuit's first factor, and the fourth corresponding to the D.C. Circuit's third factor), cert. denied, 540 U.S. 878 (2003); *Ristow* v. *South Carolina Ports Auth.*, 58 F.3d 1051, 1052 (4th Cir.) (identifying six factors, the first and fifth of which correspond to the D.C. Circuit's first, the fourth and sixth of which correspond to the D.C. Circuit's second, and the second and third of which correspond to the D.C. Circuit's third), cert. denied, 516 U.S. 987 (1995).

Under the multi-factor approaches used by the courts of appeals, the question whether a particular en-

tity is an "arm of the State" cannot be resolved through application of a bright-line rule, and courts may reach different conclusions with respect to entities that are similar in significant ways. See, *e.g.*, *Ristow*, 58 F.3d at 1053-1054 (distinguishing the South Carolina Ports Authority from the port authority at issue in *Hess* on the ground that South Carolina had issued $132 million in general obligation bonds, to be repaid from the State's general tax revenues, for improvements to the ports). This Court does not normally grant certiorari to review an appellate court's application of settled principles to the facts of a particular case. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. Petitioner argues that the court of appeals' decision conflicts with that of the First Circuit in *Royal Caribbean*, both with respect to the status of PRPA in particular and with respect to the proper methodology for resolving "arm of the State" disputes more generally. Petitioner contends (Pet. 6-10) that, whereas the D.C. Circuit held in this case that an entity must be an "arm of the State" for all purposes or for none, the First Circuit and other courts of appeals have held that an entity's status as an "arm of the State" may depend on the particular function that gave rise to the suit. This Court's review of those questions would be premature at the present time.

a. In *Royal Caribbean*, the First Circuit considered whether PRPA was immune from suit on a claim "that it negligently maintained Pier No. 6 in San Juan Harbor." 973 F.2d at 9. In an earlier case, the First Circuit had

determined that PRPA was entitled to immunity as an arm of the Commonwealth with respect to a claim asserting PRPA's *respondeat superior* liability for the negligence of a harbor pilot based on PRPA's control over pilot service pursuant to the Dock and Harbor Act, 23 L.P.R.A. §§ 2401, 2412 (2006). *Puerto Rico Ports Auth.* v. *M/V Manhattan Prince*, 897 F.2d 1, 10-12 (1990). In *Royal Carribean*, the First Circuit held that the "arm of the State" inquiry must be conducted "in respect to the particular 'type of activity' by the Ports Authority that is the object of the plaintiffs' claim." 973 F.2d at 9 (quoting *M/V Manhattan Prince*, 897 F.2d at 10). The court determined that PRPA was not entitled to immunity in *Royal Carribean* because the tasks of "running and maintaining the docks" were "not 'governmental' but 'proprietary,' rather like those of a private company that manages an office building and charges tenants for its services." *Id.* at 10. In addition to the nature of the activity at issue, the court stressed that PRPA was financially independent of the Commonwealth—that PRPA, and not the Commonwealth, would pay any judgment, that PRPA did not depend on the Commonwealth for its funding, and that PRPA's debts were not those of the Commonwealth—and that PRPA "operates with a considerable degree of autonomy." *Id.* at 10-11.

The court of appeals in this case recognized the apparent conflict with *Royal Carribean* but indicated that First Circuit decisions subsequent to *Hess* reflected a different approach. Pet. App. 10a. In *Fresenius*, the First Circuit undertook a comprehensive review of this Court's more recent Eleventh Amendment jurisprudence and determined that those intervening decisions required the court of appeals to "refine[]" its pre-*Hess*

analysis. 322 F.3d at 68. Because the First Circuit has not considered PRPA's status in light of this Court's most recent Eleventh Amendment decisions, it is unclear whether any square circuit conflict currently exists on the question whether PRPA is immune from the FMC adjudication at issue in this case.

b. Petitioner further contends that the court of appeals' decision conflicts with those of other circuits on the broader question whether an entity's status as an "arm of the State" can vary "depending on the claims and activities involved in the case." Pet. 6; see Pet. 6-10. This Court has not directly addressed the question whether an entity's status as an "arm of the State" can "change from one case to the next" (Pet. App. 8a) based on the nature of the function that gives rise to the suit. In *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), however, the Court considered the conceptually related question whether an "arm of the State" may be subject to private damages suits for conduct that is proprietary in nature. In his dissenting opinion in *College Savings Bank*, Justice Breyer (who as Chief Judge of the First Circuit was the author of *Royal Caribbean*) concluded that even an entity that was assumed to be an "arm of the State," see *id.* at 691 (Stevens, J., dissenting), should not be afforded immunity for "ordinary commercial activity" akin to that of a private participant in the marketplace, *id.* at 699 (Breyer, J., dissenting). The Court, however, rejected the contention that "state sovereign immunity is any less robust where" the conduct at issue "is traditionally performed by private citizens and corporations," *id.* at 684.

The decision in *College Savings Bank* does not foreclose the possibility that a State may choose to create an

entity that is an "arm of the State" for some purposes but not for others. Respondent PRPA concedes that "[n]othing in the decision below imposes any limits on the states' *ability* to create entities that expressly enjoy sovereign immunity for some purposes but not others." PRPA Br. 12. Similarly, numerous court of appeals decisions recognize the possibility that a political subdivision or official that is not "an arm of the State" may be immune from suits challenging the performance of actions taken as a state agent. See Pet. 8-10 (citing cases); PRPA Br. 12 n.3 (same). When presented with the issue again, the First Circuit may conclude, consistent with its holdings in *Royal Caribbean* and *M/V Manhattan Prince*, that PRPA is not an arm of the Commonwealth as a general matter, as reflected in PRPA's organic statute, but that it is entitled to assert the Commonwealth's immunity when it acts in a regulatory capacity under the specific authority of the Dock and Harbor Act.[2] For the reasons discussed above, however, the Court should not

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[2] The court of appeals treated PRPA's organic statute and the Dock and Harbor Act as equally relevant to the determination whether PRPA is an "arm of the State." See Pet. App. 11a-22a. PRPA's brief in opposition further confuses the issue by citing indiscriminately to sections of the organic statute and of the Dock and Harbor Act as though they were contained within the same enactment. See, *e.g.*, PRPA Br. 3-4. PRPA also states, without qualification, that "an action alleging fault or negligence against PRPA acting as an agent of the Commonwealth must be brought against the Commonwealth itself." *Id.* at 4 (citing 23 L.P.R.A. § 2303(b) (2006)). The cited provision, however, is expressly limited to actions taken by PRPA officials or employees "under the provisions of this chapter," *i.e.*, the Dock and Harbor Act, and it specifically states that the Commonwealth's liability does *not* extend to acts taken by PRPA or its officers "in the exercise of the property rights of the Authority as a public corporation." 23 L.P.R.A. § 2303(b) (2006).

grant certiorari to decide that question until the First Circuit has reconsidered its *Royal Carribean* decision in light of this Court's most recent precedents.

c. The question whether PRPA is an arm of the Commonwealth, either in general or in its performance of particular functions, can easily be raised again before the First Circuit, which has general appellate jurisdiction over cases arising from the United States District Court for the District of Puerto Rico. 28 U.S.C. 41. Indeed, if the FMC dismisses a future complaint against PRPA in accordance with the D.C. Circuit's ruling in this case, a disappointed claimant that resides in Puerto Rico can seek review of that decision in the First Circuit. See 28 U.S.C. 2343 (petition for review from an FMC order may be filed in the D.C. Circuit or in "the judicial circuit in which the petitioner resides or has its principal office"). Because it is as yet uncertain how the First Circuit will resolve that issue in light of this Court's more recent Eleventh Amendment decisions, review by this Court is unwarranted at this time.

3. An additional consideration counseling against review is the fact that the petition presents a question concerning the proper application of the Eleventh Amendment in a case in which the Eleventh Amendment applies only indirectly, if at all. In determining that PRPA was immune from the FMC's adjudication of a private complaint, the court of appeals did not decide whether arms of the Commonwealth are entitled to immunity under the Eleventh Amendment. See Pet. App. 6a n.1. Rather, consistent with the agreement of the parties and with governing circuit precedent, see *Rodriguez* v. *Puerto Rico Fed. Affairs Admin.*, 435 F.3d 378, 381-382 (D.C. Cir.), cert. denied, 549 U.S. 812 (2006), the court treated the Puerto Rican Federal Relations Act,

48 U.S.C. 734, as granting the Commonwealth "the same sovereign immunity that the States possess" under the Eleventh Amendment, Pet. App. 6a.

This Court has expressly reserved decision on the question whether Congress intended "the Commonwealth of Puerto Rico is to be treated as a State for purposes of the Eleventh Amendment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993). Because petitioner has not raised that issue, the Court would not normally address it in this case. In light of the canon of constitutional avoidance, however, the better course would be for the Court to resolve the statutory question, in a case that presents the issue, before reaching a constitutional issue that might otherwise be avoided.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

INTERNATIONAL SHIPPING AGENCY, INC.,
Petitioner,

v.

PUERTO RICO PORTS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The Solicitor begins his argument with the truism that "[t]his court does not normally grant certiorari to review an appellate court's application of settled principles to the facts of a particular case." S.G. Opp. at 10. The argument does not apply here, because the petition's first question presented is one that this Court expressly reserved in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997). The argument is further undermined by the Solicitor's necessary acknowledgement that "[t]his Court has not directly addressed the question whether an entity's status as an 'arm of the State' can 'change from one case to the next' (Pet. App. 8a) based on the nature of the function that gives rise to the suit." S.G. Opp. at 12. Petitioner does not, as the Solicitor suggests, argue that the court below considered the wrong factors Instead, petitioner argues in the context of its second question presented that the D.C. Circuit's improper adoption of a novel "all-or-nothing" approach to Eleventh Amendment analysis (the first question presented) directly caused its misapplication of those factors. In short, the Solicitor has not identified any "settled principle" that petitioner urges has been misapplied, and there is none.

PRPA makes a related argument – that reversal on the first question would not lead to a change in the outcome below. PRPA makes its version of the argument on a factual rather than a legal basis. Specifically, PRPA seeks to paint the dispute as one over a port redevelopment project – the "Golden Triangle" – that PRPA characterizes as having been run by the Governor. See PRPA Opp. at 5-6, 14. As the Solicitor correctly points out at page 6, footnote 1 of his opposition, however, the court below erred in

reciting PRPA's version of the facts. The Solicitor notes that: "The court referenced the redevelopment of San Juan's waterfront as 'the facts in this case,' Pet. App. 18a, but it does not appear from petitioner's complaint before the FMC that its claims arise out of the redevelopment project, see p. 4, *supra*."

2. The only real argument in opposition, made by both PRPA and the Solicitor, is that there is a possibility that the First Circuit may have changed its mind with respect to its position that an entity may be an arm of the state for some purposes but not others.

PRPA urges that "the First Circuit silently changed course." PRPA Opp. at 10. By its nature, PRPA's "silent change" argument admits that it has no affirmative basis. Accordingly, there is little to which petitioner can reply. PRPA cites four cases, see PRPA Opp. at 10-11, in which it claims that the First Circuit's failure to enunciate a function-specific analysis proves that it has abandoned that approach. The simple answer is that the entities involved in those cases were not created under statutory provisions that authorized those entities to undertake multiple and distinguishable functions. The statutes governing the PRPA, in contrast, do so provide, and it is that difference that accounts for the function-specific analysis in *Puerto Rico Ports Authority v. M/V Manhattan Prince*, 897 F.2d 1 (CA1 1990), and *Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d 8 (CA1 1992), and that likewise accounts for the lack of any such analysis in the cases cited by PRPA. The absence of a multi-function analysis in the cited cases is no more telling than the fact of a mechanic not discussing brake repair with a customer who complains of a heater malfunction, even

though that mechanic has often dealt with brake repairs in the past. Sometimes silence can be read to mean something; here it cannot.

The Solicitor is a bit more cautious, passing on PRPA's facially suspect "silence" argument and urging instead that "[b]ecause the First Circuit has not considered PRPA's status in light of this Court's most recent Eleventh Amendment decisions, it is unclear whether any square circuit conflict currently exists on the question whether PRPA is immune from the FMC adjudication at issue in this case." S.G. Opp. at 12. This argument fails for two reasons.

First, the Solicitor offers no explanation of what it is about "this Court's most recent Eleventh Amendment decisions" that might cause the First Circuit to change its mind. If there were in fact something specific, or even general, in this Court's recent decisions that would suggest that the First Circuit might change its mind, petitioner would expect the Solicitor to say what it is. He has not, and as such the argument amounts to nothing more than idle speculation that the First Circuit might change position. Under that theory, circuit splits would become rare indeed.

Second, the First Circuit in 2004 (after which there have been no Eleventh Amendment cases from this Court that have been cited by the Solicitor or PRPA) decided *Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570 (CA1 2004), an age discrimination case. In *Camacho*, the First Circuit cited both *Manhattan Prince* and *Royal Caribbean* in discussing the functions delegated to PRPA by the legislature. The discussion highlights the fact that the First Circuit reached different conclusions in those two cases based on the PRPA functions involved in each:

> This holding is in line with our prior precedents. We previously ruled, in a negligence case, that the Authority could not be held liable for a pilot's carelessness on a respondeat superior theory. *See P.R. Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1, 12 (1st Cir. 1990). Implicit in this holding is the determination that, as a licensing and regulatory body, the Authority does not exercise the type of control over harbor pilots that would be needed to qualify it as their employer under common law agency principles. *See id.* (observing that the Authority's "functions are related to licensing and the competency of pilots" and that it "acts like a public service commission, setting and enforcing the standards within the industry") (citation and internal quotation marks omitted); *see also Royal Caribbean Corp. v. P.R. Ports Auth.*, 973 F.2d 8, 12 (1st Cir. 1992) (distinguishing the Authority's regulatory role in overseeing pilot services from its proprietary role in maintaining pier areas).

Id. at 578.

The Solicitor might quibble that *Camacho* is not an Eleventh Amendment case, but that would both miss the point and also fail to explain why the Solicitor did not address the case. The significance of the case here is simply that its existence provides a recent and strong indication from the First Circuit that it has not in fact changed its mind about the function-specific approach that it enunciated in *Manhattan Prince* and *Royal Caribbean*. Instead, that court in *Camacho* went out of its way to reaffirm both those holdings *and* the reason why the two cases yielded different outcomes. That restatement of the function-

specific approach cannot be squared with the uncertainty that respondents seek to conjure from thin air.

The First Circuit and the D.C. Circuit are in square conflict on the issue of whether an entity may be an "arm of the state" for some purposes but not for others. The question is one that must be addressed as a threshold matter in any case involving an entity that a state has by statute clothed with multiple, distinct functions. Unless this Court resolves the conflict now, the split and the D.C. Circuit's novel approach will lead to confusion and conflict in the lower courts. The issue is important and ripe, and this Court should review it now.

Respectfully submitted,

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